AMERICAN BAR ASSOCIATION
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New Appointment to U. S. Supreme Bench

PRESIDENT HARDING has named Hon. Pierce Butler, of St. Paul, Minn., a lawyer of wide experience and high standing at the bar, and a Democrat in politics, to fill the vacancy on the U. S. Supreme Bench caused by the resignation of Associate Justice Day. The new appointee was born in Dakota County, Minnesota, on March 17, 1866, and he is thus named for the Supreme Bench in the prime of life and intellectual vigor. He was graduated from Carleton College, Northfield, Minn., in 1887, and was admitted to the Bar in 1888. He served as Assistant County Attorney in 1891 and 1892, was County Attorney from 1892 to 1896, and Local Attorney General of Omaha Railroad from 1898 to about 1903. He was in general practice from that time on in the firms of Eller, How & Butler, How, Butler & Mitchell, Butler & Mitchell, Butler, Mitchell & Hoke, and finally Butler, Mitchell & Doherty, from 1897. In addition to his legal work he was a member of the St. Paul Charter Committee from 1900 to 1909; President of the Ramsey County Bar Association, and subsequently of the Minnesota State Bar Association; and has been a member of the Board of Regents of the University of Minnesota since 1907.

The more important litigations in which he has been engaged are as follows: Minnesota rate cases; Special Assistant Attorney General in the bleached flour cases under the Pure Food Act, tried in New Orleans and Kansas City in 1909 and 1910; Special Assistant Attorney General in prosecuting Swift, Armour, and other meat packers under the Sherman Anti-Trust Act in 1912; counsel for the western group of railroads engaged in the federal valuation of railroads from 1913 to 1917; counsel for Canadian Northern Railway in the condemnation proceedings by the Canadian government in 1919; counsel for Canadian government in the condemnation proceedings of the Grand Trunk Railway in 1921.

Law Schools and Bar Association Standards

THE seventeenth annual report of the President of the Carnegie Foundation contains an interesting discussion of law school standards, based on the standards of the American Bar Association and the Association of American Law Schools, and also a compilation showing those which are at present in force in the various law schools of the country. Speaking of the task of publishing a list of law schools which comply with the American Bar Association standards, which was committed to the Council of Legal Education, the report states that this is now under way. "Since the Association," it adds, "has phrased its standards only in broad general terms, the Council will be obliged to restate them in precise technical language, capable of being applied to individual schools. This fact, coupled with the difficulty of securing detailed information from the numerous schools, makes the task that confronts the Council far more difficult and time-taking than can well be realized by those who have had no experience in similar undertakings. The writer has reason to believe that the work is being done in a spirit of absolute fairness, with the intention to apply only objective tests, not colored by personal opinion or by consideration of matters outside the scope of the original resolutions. As stated in the last Annual Report, if law schools that do not comply with the Council's standards are not compendiously stigmatized as 'bad,' the periodical publication of a list of institutions classified on this basis should be of tremendous assistance in enabling students intelligently to choose between the different avenues of preparation that are open to them." The report further adds that the practical value of a list of this sort will be greater because of the decision

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of the Association of American Law Schools, at the 1921 meeting, not to undertake a classification of its own, but to endorse the action of the American Bar Association directing that such a classification be made by the Council of Legal Education. The danger of confusing the public by independent classifications has thus been greatly reduced.

1922 Annual Report

THE 1922 Annual Report of the American Bar Association was issued and distributed two months earlier this year than ever before. Certain changes have been made in the arrangement of the book which will be regarded as decided improvements. The list of judges in attendance upon the meeting of the Judicial Section is placed immediately after the proceedings of the section, and the list of delegates to the Conference of Bar Association Delegates appears immediately after the proceedings of that body. The list of members by states, cities and towns, inaugurated in a previous issue, is continued, but is arranged in three columns instead of two as heretofore, thus making it more convenient and reducing somewhat the expense. The report contains the transactions of the forty-fifth annual meeting at San Francisco, the speeches there delivered, the reports of committees, the proceedings of sections, and much other matter of permanent value. It has 1026 pages, but the thin paper used keeps it from being bulky and inconvenient for handling and reference.

"I and R" Set Aside in Mississippi

A RECENT decision of the Mississippi Supreme Court held invalid the constitutional amendment providing for the Initiative and Referendum, which was adopted some years ago. It declared that the section of the Constitution providing for the submission of amendments had not been complied with and, further, that the Initiative and Referendum Amendment had not received a majority of those voting, as required by the Constitution. The Supreme Court's decision on this latter point, it is understood, is identical with that rendered over twenty years ago in a case involving an amendment to the Constitution providing for an elective judiciary. This decision turned largely on the question of whether the vote required for the adoption of an amendment under the State Constitution was a majority of those voting on the particular proposition, or a majority of the total vote cast at the election, and the Court adopted the latter view.

At Work on Judicial Code of Ethics

THE Committee on Judicial Ethics of the American Bar Association, appointed for the purpose of drafting canons of ethics for the guidance of the judiciary, and thus supplying what has come to be regarded as a plain need of the situation, recently held meetings in New York to consider the problem involved. Data bearing on the subject are being collected and it is expected that the work will be so far advanced by the meeting of the Executive Committee at Hot Springs, Arkansas, on January 15, that a report can then be presented to that body. Chief Justice William Howard Taft is the chairman of this committee, a fact which sufficiently emphasizes the importance which is attached to its work. The other members are: Judge Leslie C. Cornish, Augusta, Maine; Chief Justice Robert Von Moschzisker, Philadelphia, Pa.; Charles A. Boston, New York, N. Y.; Garrett W. McEnerney, San Francisco, California.

To Prepare Draft of New Uniform Law

THE Committee of the Commissioners on Uniform State Laws appointed to prepare a draft for a Tribunal to Determine Industrial Disputes met in Chicago on November 24th. The following constitute the Committee: Charles M. Dutcher, Chairman, Iowa City, Iowa; Henry M. Bates, Dean, Law School, University of Michigan, Ann Harbor; James M. Graham, Springfield, Illinois; Chester I. Long, Wichita, Kansas; Charles E. Shepard, Seattle, Washington; Charles Thaddeus Terry, New York City; J. W. Vandervoort, Parkersburg, West Virginia. All members were present. The Committee was in session all day, and at the close of the discussion Charles Thaddeus Terry, Henry M. Bates and Chester I. Long were appointed a sub-committee to draft the bill. A further meeting will be held in the near future to receive and discuss the draft and the final result of the Committee's labors will go before the Conference of Commissioners on Uniform State Laws and ultimately to the American Bar Association.

Officers of the Association

EACH issue of the Journal will henceforth contain a list of the executive officers of the Association, printed in a sufficiently conspicuous place, for the convenience of those who may wish to communicate with them. Various letters recently received have suggested that it was not always easy to recall or refer to the previous issue in which their names and addresses appeared and that continued publication would be more satisfactory.

WHERE THE JOURNAL IS ON SALE

The American Bar Association Journal is on sale at the following places:

New York—Brentano's, Fifth Ave. & 27th St.

Chicago—A. C. McClurg & Co., 218 So. Wabash Ave. P. O. News Company, 21 W. Monroe St.

Denver, Colo.—Herrick Book & Stationery Co, 934 Fifteenth St.

Los Angeles, Calif.—Fowler Bros., 747 So. Broadway. The Jones Book Store, 426-428 W. 6th St.

Dallas, Texas—Morgan C. Jones, 101 N. Akard St.

San Francisco, Calif.—Downtown Office of The Recorder, 77 Sutter St.

SIGNED ARTICLES

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

LABOR RELATIONS AND THE LAW

In Spite of a Body of Sound and Progressive Decisions the Courts in Common Opinion Have Not the Equipment or Processes for Dealing Adequately with Questions Which Are the Largest, Most Vital and Menacing in the Nation's Current Life

By NEWTON D. BAKER
Of the Cleveland, Ohio, Bar

I HAVE no desire in this paper to present a brief upon any particular labor controversy, but rather if I can, to illustrate the historical antecedents of present-day labor controversies, the attitude of the law in the past toward them, and at least by brief reference give some account of the efforts which have been made to solve them.

At the outset it may be observed that the struggle for liberty has always been beset by group activities which have sought, on one ground or another, a preferential position. This speculation is not original with me, but its truth is obvious to anyone who is acquainted with general political history. International relations have in the past largely been based upon preferential treaties. Perhaps half the wars in history have been fought at least in part, to secure economic advantage. Most of the aggregated empires and states of history have remained aggregations rather than consolidated states because of the insistence of component parts upon the retention of privileges as against the common right, as may be illustrated by the so-called free cities of North Germany or the Austro-Hungarian Empire, in which practically the only unity attained was in the person of the sovereign and in action regulating foreign affairs. Frequently the privileges sought to be retained have been religious or linguistic, but their usual basis is economic and when analyzed to their real meaning they show a desire on the part of a group to occupy, as against others, a preferred position either of opportunity or of right. From the Middle Ages to our own day, industrial and commercial groups have consciously or unconsciously followed this philosophy. The great Guild System is, of course, based upon it. It is fair to say that the members of these groups have rarely, if ever, been conscious of the real significance of their activities. The Fishmongers' Guild undoubtedly felt that they exercised a peculiar craft, about which the common knowledge was wholly inadequate; and that it was necessary for them, by concerted action to protect themselves against an invasion of their rights by persons who were unable to comprehend the peculiar necessities of their situation, and, therefore, could not be trusted, by general regulations of universal application, to lay down rules for the conduct of their business.

In our own country the struggle has been constant. Sometimes we see the money power seeking to gather power to itself, and to control the agencies of government in order to assure special facilities and guarantees to wealth. Sometimes the debtor class seeks to soften the hardships of its position by debasing the currency. Sometimes we have agrarian movements, the object of which is frankly to secure by legislation a privileged position for the farmer in recognition of his peculiarly valuable service. We are, therefore, not to be surprised if we find the laboring class organizing itself into guilds or unions, recognizing its own class interest, making efforts to secure for itself a position of prerogative power, and to sustain that position by either political means or economic coercion.

In this matter as in so many others history and common sense alike urge us to tolerance, and it is a pleasure to feel that while passion may be developed by partisans in these controversies the Bar Association of a great city will approach them without prejudice, and with no purpose except by influence or by action to be helpful toward a constructive solution of the problems.

We owe to the industry and learning of Mr. Justice Brandeis a very extraordinary collection of references to authorities dealing historically with the rights of labor. In a dissenting opinion in Truax v. Corrigan, decided December 19, 1921, he says:

> In England a workman struggling to improve his condition even when acting singly was confronted until 1813 with laws limiting the amount of wages he might demand. Until 1824 he was punishable as a criminal if he combined with his fellow workmen to raise wages or shorten hours or to affect the business in any way, even if there was no resort to a strike. Until 1871 members of a union who joined in persuading employees to leave work were liable criminally, although the employees were not under contract and the persuasion was both peaceful and unattended by picketing. Until 1871 threatening a strike, whatever the cause, was a criminal act. Not until 1875 was the right of workers to combine in order to attain their end conceded fully. In that year Parliament declared that workmen combining in furtherance of a trade dispute should not be indicted for criminal conspiracy, unless the act, if done by one person, would be indictable as a crime. After that statute a combination of workmen to effect the ordinary objects of a strike was no longer a criminal offense, but picketing, though peaceful, in aid of a strike remained illegal, and likewise the boycott. Not until 1906 was the ban on peaceful picketing and the bringing of pressure upon an employer by means of a secondary strike or a boycott removed. In 1906 also the act of inducing workers to break their contract of employment (previously held an actionable wrong) was expressly declared legal. In England improvement in the condition of workingmen and their emancipation appeared to have been deemed recently the paramount public need.

Each of these statements is sustained, by reference to statute or decision, in the opinion from which I have quoted. There is also given in the opinion of the learned Justice a compendious account of the progress of the labor movement, as against the traditional common law restraints in the English-speaking colonies of the British Empire. Altogether they show a progressive recognition of the existence of rights in workers, largely in the way of statutory relief against restrictions imposed by the courts. This, of course, is what one would expect, for the common law system has, for at least 600 years, proceeded upon precedent and analogy. At the beginning of that period the worker was the man or serf of his overlord, and

Note: Address delivered before the Cleveland, Ohio, Bar Association, October 17, 1922.

bore to him not only a position of military subordination but of entire economic dependence, growing out of the land tenure system. It was, of course, a very different relationship from slavery, but still a relationship which implied restrictions and restraints, which when announced by the courts, became embodied as precedents and required legislative action for their change. That this progressive modification of the master and servant relationship in England should have taken place in the nineteenth century is due to two fundamental causes. First, the development of industry which, with the discovery of the applications of steam and later of electricity, has replaced the simple and small hand-working shop with the factory system, in which the individual artist artisans have been supplanted by machines operated by central power and grouped into factories where the labor of immense numbers of men is so highly specialized that no one of them has a trade, and the welfare of each is dependent upon the co-operative activity of the entire group. This substitution has not only changed the relation of workers to industry, but has changed the economic and often the political basis of entire societies. The whole mechanism of a modern civilized state is now so intimately integrated that no industry can long remain prosperous unless all industry shares in a general prosperity. Statesmen have not always fully realized the completeness of the social revolution brought about by the machine. Workers have often failed to recognize it and have fought, as though blindly and against a fate which they could not understand, the introduction of labor-saving machinery, perfectly aware of the obvious saving and yet dismayed by the unaccountable disasters which came to them with each surrender of their former independence and with each acceptance of a relationship, in which their own good will, energy and industry are not enough to assure either continuity of employment or profitable occupation. They feel themselves subject to being paralyzed by influences generated by conditions which they do not understand, among people whom they do not know and in places of which they have never heard. The economic distress thus caused inevitably led to political unrest and as inevitably to industrial change and reorganizations.

The other influence at play in this whole matter was that growing humanitarian spirit which Macaulay so superbly describes in the third chapter of his History of England. The cold and matter-of-fact individualism which characterized the industry and life of England prior to the eighteenth century gradually gave way before a spirit which not only recognized the naked rights of individuals but can best be described as an immense pity for the unfortunate, the handicapped and the unprivileged.

To us in America with our highly developed benevolent institutions, both public and private, and the vast body of social legislation which has been enacted within the last fifty years, it is difficult to believe that anywhere in the world the humanitarian spirit could lag, but those who have become familiar with the point of view which obtains in the countries of the Levant and the Near East will perhaps agree that many of our elementary and commonplace humane emotions are wholly unknown to them, and that the extent to which the humane motive prevails and is developed is a fair measure of the entire civilization of a country considered by modern standards. The modern industrial corporation has been called soulless. Certainly under modern industrial conditions the old intimacies between employer and employee have disappeared, and a large part of the field of these relations which was formerly dominated by private conscience seems to have been closed, but at the same time there has been developed by industrial civilization as it were a conscience of its own which is larger, more impersonal and better adapted to meet and remedy the ills which have come with congestion, mass production and the dependence of the worker upon the machine. The manifestations of this spirit are innumerable. On the private side they extend up to Andrew Carnegie's devotion of his entire fortune to philanthropic foundations, from rest and recreational facilities in industrial plants. On the public side, this new conscience has filled the statute books of the nation and the several states with laws protecting the safety and welfare of workers. At first these laws were aimed at obvious physical perils like the air-brake and safety coupler statutes and those requiring the guarding of dangerous machinery. It is sometimes claimed that these laws are the fruits of organization and union among the workers themselves, and no doubt the great labor organizations have helped to secure them. But the finer legislative products of this great mass conscience have not been wholly due to organized labor. In recent years the American Federation of Labor has looked with indulgence upon laws for the benefit of women and children in industry, but has not been jealous for legislation in the interest of adult male workers. This has not been a uniform attitude, and probably its expressions have applied more to legislation which approached the borderland of wage and hours controversies. Nevertheless the progress has been constant. In most of the industrial states of the Union the hours and conditions of labor of women and children are regulated by law. Public commissions have studied the effect of industrial fatigue and laws have been passed and sustained by the Supreme Court of the United States because of the revelation of those studies which certainly would have been declared beyond the police power, had this new scientific knowledge not been brought to light in response to the demand of the mass conscience. The whole category of occupations dealing with poisons have been required by public opinion to safeguard their workers. In illustration it may be said that the humanitarian spirit has no finer achievement to its credit than the rescue of the matchmakers from the deadly and loathsome diseases caused by the inhalation of phosphorus. A distinguishing characteristic of the attitude of this mass conscience toward industry has been its demand that the products of a particular industry should themselves bear the whole burden of their production, and that no industry should be permitted either to transfer to the public charge its human losses or leave those human losses to be vicariously borne. This is the justification of the Workmen's Compensation Acts, and in part of minimum wage laws.

With this survey of the trend of public opinion toward our industrial development, I turn sharply to a short account of the present situation. After a history which has alternated between craft organizations and the one big union idea, we now have the railroad workers of the country organized in five large brotherhoods with memberships aggregating about two million. We have the American Federation of Labor which comprises practically all of the craft organizations and of which the present membership according to a recent official announcement of Mr. Gompers is 3,195,651. The railroad brotherhoods are practically

open shop organizations in the sense that no one of them requires a contract between it and a railroad to exclude non-brotherhood members from its service. The American Federation of Labor has never officially adopted a closed union shop declaration; in many industrial centers, however, the unions in some trade have become strong enough to impose that requirement and apparently the closed union shop is generally accepted as an ideal by national and local labor leaders. The strength of these bodies of workers is such that the fundamental industries of transportation in this country could not operate a day against the combined action of the brotherhoods, and the life of our large cities and industrial centers depends in a thousand ways for its productivity and prosperity upon the determinations of the organized industrial crafts.

Few of us realize, I am sure, that organized labor has become not only a powerful factor in the daily industry of the country but a great physical power. The check-off imposed in the soft coal mines of the Central Competitive District is estimated to produce $15,000,000 a year. The annual receipts of the railroad brotherhoods are probably an equal amount, while into the treasury of the national and international craft organizations and of the Federation of Labor an amount estimated at sixty million of dollars is annually gathered. They are strong enough in fact to carry on wars, and we have permitted such wars to go as at Coeur d'Alene and Homestead and one is still raging and has been for five years in West Virginia under conditions as fruitless and ruthless as any medieval feud between rival robber barons. The claim on the part of the workers to a right to participate collectively in determining wages and conditions of employment has from the beginning had to fight every inch of the way. Employers realized well enough the change which had taken place with the advent of the factory systen, but they found it difficult to realize that anybody had thereby acquired a right to interfere with their management of their business. There are today many employers who feel that their workers have no such knowledge of the office end of the business as would justify their being consulted about management questions even when they affect the welfare of the workers. They believe that every combination of their employees for the purpose of raising wages or improving conditions is a conspiracy, that the representatives of unions who seek to organize their workers are at best impertinent trouble-makers sowing discontent and distrust among people who are quite well enough off, and that the whole purpose of the trade union movement is an assault upon the right of private property and the integrity of the institutions, political and economic, devised by our fathers. They may be taken to represent the extreme capitalistic view. On the other hand, in the labor movement there are many Marxian socialists who frankly avow the object of the movement to be a dictatorship of the proletariat and as frankly proclaim their belief that this social revolution should be brought about by violence and sabotage. From these two extremes, opinions and beliefs shade down until in many happy instances they disappear in the establishment of effective co-operative relations between employers and employees; but until that community of interest and co-operative spirit is established war is carried on between these two beliefs constantly and relentlessly, and with increasing frequency this war flames out into battles in which property and life are callously sacrificed and the public interest denied recognition or protection. Every agency and instrument of irritation is employed by both sides; by the employers, spies, lockouts, and heavily armed private armies to terrorize employees and anyone from the outside who would venture to approach them. On the side of labor, strikes and boycotts, primary and secondary, with open assaults upon persons and private destruction of property.

It is sometimes difficult to tell who starts the conflagrations and riots. The armies face one another at close range and the sentinels on both sides are jumpy. The result, however, is that any dispassionate description of American Labor relations today would be obliged to conclude that they are frankly anarchistic appeals to brute force, restrained only by prudential considerations and wholly untamed by the ordinary moralities. It is no part of my present purpose to assess blame for this condition. In large measure it has grown up as a normal development of the fighting spirit. Our industrial progress has been so rapid that our institutional progress could not keep pace with it. We have left our courts with nothing better than medieval conceptions of the rights of property and man to apply by analogy in a situation too intricate and vital in its social implications to be so ruled. It is as though we were to give our courts the Zulu Code and ask them to apply it to the adjustment of American domestic and business problems. As a consequence, when these raw and bleeding controversies come into court our judges have had to forget that it is their duty to declare and not dare to give the law; and because the parties themselves could not co-operate and society has failed to declare in a legislative way the rules for these disputes, the courts have amplified the ancient and narrow rules of property and conduct until a system of codes has been promulgated, practically a code by each judge, depending for its restrictions and recognitions upon the judge's personal equation and constituting no body of settled law in which any trained lawyer can safely find his way and advise a client on either side of the contest. It is a curious fact that in early English history each king upon his accession promulgated what was called the King's Peace, which was in fact a code of criminal law defining offenses and fixing penalties which would be enforced by the king for the protection of the peace of the realm. When the king died his peace died with him, and until his successor in turn promulgated *his* peace there was no law; and so now in labor controversies each judge has in part at least his own code, and, when a labor controversy arises there is a great scurrying on both sides to get it before a judge whose code, that is to say whose personal equation, is satisfactory, and who it is thought can be relied upon out of sympathy or ambition or fears to favor one side or the other.

The courts are called in after the fight has started and are limited in their inquiries to the protection of life and property, which are mere incidents in the controversy. They have no machinery or jurisdiction to inquire into the causes or to redress the grievances out of which the conflicts have grown.

The consequence has been disastrous. Apart from the present, and, we hope temporary, disrespect for law growing out of the sudden enactment of prohibition, there is no field of legal administration which has so absolutely failed to secure public confidence and respect as the law in labor disputes. Nor is this lack of respect limited to the workers. Employers scoff at

cowardly judges as workers rail at capitalistic courts. The public are mystified at the spectacle of court-made crimes, enforced as contempts, without a jury trial, by a judge whose feelings are apparently offended when his orders are disobeyed, and who often seems to feel that the dignity of the court as well as of the law must be vindicated by severity. Phrases like "government by injunction" capture the roving imagination of the public and are denounced in the platforms of great political parties; the recall of judges and of decisions becomes a progressive political tenet and Attorney Generals are threatened with impeachment all because courts are called upon to promulgate and enforce police regulations in a field where we citizens have not yet reached ideas clear enough to legislate. Just what would have happened if the courts had not enlarged their equity powers and kept some semblance of peace I do not know; but the thing that has followed their assumption of the jurisdiction is a loss of prestige in the courts and a widespread distrust of law and courts, and the bewildered courts with all their powers have been unable to dispel it, though every now and then some editor, orator or agitator is put into jail for expressing it.

The extent of the distrust of legal remedies enforcible by the courts, on the part of Labor is best shown by the extended examination of Mr. Samuel Gompers, by Mr. Untermeyer before the Lockwood Investigating Committee in April of this year.

The committee was investigating building costs and there had been submitted to it some striking illustrations of the ruin of innocent contractors by jurisdictional controversies among their employees, which tended greatly to increase the cost of building to the public. The examination of Mr. Gompers took a wide range. Mr. Untermeyer submitted to him statements showing oppressive practices by trade unions in New York like the following:

(1) A jurisdictional dispute, upon a $30,000,000 power house at Hell Gate, which long delayed and greatly increased the cost of this public improvement.

(2) The experience of two men expelled from the Carpenters' Union for attempting to criticise the activities of Brindell, who was later sentenced to the penitentiary for extortion. These men by reason of their expulsion were unable to get work at their trade in this country, and one of them went to Mexico for work.

(3) The fact that since October, 1920, the Plumbers' Union of New York had declined to admit new members, thus maintaining an inadequate supply of plumbers, delaying both public and private work and preventing any competition among plumbers and increasing the cost of plumbing.

(4) That although there are about 12,000 or 15,000 electrical workers in New York the Electrical Workers' Union confined its membership to 3,800 and would admit no more, although under excessive pressure they issued non-union electrical workers permit-cards at $2.50 a week, yielding in two years a revenue to the Union of about $150,000.

(5) The fining by the Union of certain German and Danish workmen for working on St. Patrick's Day; and a great variety of other instances of injury with damage either to the public interest or to private individuals within or without the unions themselves. In practically every instance Mr. Gompers admitted the wrong, but every time Mr. Untermeyer asked whether, in view of such wrongs, Mr. Gompers would be in favor of a law which would give the courts the right to redress the wrong, he answered emphatically "No." During that hearing he, 150 times, answered "No" to questions which aimed to secure his approval of legislative remedies of such injustices and abuses, and when his answer was enlarged beyond a mere negative he said "God save Labor from the courts," or "These things must be left to be worked out by evolution of the labor movement itself, without outside interference," or "Organized society has no understanding of the affairs of Labor," or some equivalent phrase, the foregoing being exact quotations.

I know Mr. Gompers intimately and personally. During the war my association with him was constant and I had an opportunity to observe both the native strength of his intellect and the high and earnest quality of his patriotism, so that whether we agree with the views he expresses or not we must at least start with the assumption that they are honestly held and flow from what he regards as the practical necessities of the situation, however much he realizes them to be at a variance with the abstract principles, mildly syllogized by political philosophers who have no responsibility for the welfare of a great class. Mr. Gompers' own explanation, frequently given, for his tolerance of such instances of oppression and injustice, as well as his sorrowful tolerance of the violence of labor controversies, is that it is better to have temporary wrongs than permanent injustice, and that to subject the workers to compulsory labor as the result of judicial decrees would mean the practical enslavement of the working class.

With regard to these views of organized labor as expressed by Mr. Gompers, two things must be remembered. The obstinate refusal on the part of the employers to recognize the collective rights of labor has necessitated the choosing of fighting leaders rather than statesmen by labor unions, and although Mr. Gompers is himself both a philosopher and a statesmen he must be a fighting leader to maintain his hold upon his following. At every convention of the American Federation of Labor, in recent years the Radical and Red wing have sought to unseat him as being a conservative, and his personal opposition to the violent and anarchistic element in the labor movement has probably both saved the movement itself and spared the country great disorders. Second, it must be remembered that since the labor controversy is, by tacit public consent, permitted to be organized as a war we must expect the leaders on both sides in the heat of conflict to take extreme positions.

But after all there is much to be said for the position which Mr. Gompers assumes. The labor controversy is essentially economic and therefore political, and no people in history has ever willingly submitted its economic and political questions to judicial decision. Such questions constitute the issues upon which public opinion must be brought to bear, and the normal process of solution for them is widespread and accurate information followed by debate, and resulting in a stabilized public consciousness finally expressed in laws dealing with the fundamental causes of the controversy, rather than mere donations of power to judicial officers to devise and apply from time to time such opportunist and repressive remedies as the exigencies of varying situation may suggest.

I would not leave the impression that the action of the courts has always, or even often been open to fair criticism. The mass of labor decisions in the federal and state courts is tremendous, and at times nothing has seemed to stand between us and civil war but

orders made in labor controversies, when the passions of the contestants have outstripped all ordinary social restraints. Indeed there has been built up in this country a body of decided law which has set at rest some questions and guaranteed some rights of the highest value. Occasionally one of these cases gets to the Supreme Court of the United States, and the line of cases there on these subjects illustrates, in the highest degree, the fact that that great court, often spoken of as consisting of old men long cloistered from modern currents of affairs and opinions, has been progressive, just and brave. In some of these cases as Butchers' Union v. Crescent City, 111 U. S.; Coppage v. Kansas, 236 U. S.; In re Debs, 158 U. S.; Gompers v. Buck Stove & Range Co., 221 U. S., and the Danbury Hatters' Case, 208 U. S., the court found itself under the necessity of declaring some state law invalid or holding some labor union or labor leader responsible for violence or in contempt of a valid order, and these decisions have from time to time been cited as showing a hostile attitude on the part of the court toward labor. The fact is, however, wholly otherwise. A comprehensive examination of the cases will show that the Supreme Court has squarely recognized the right of collective bargaining, the legitimate interest of workers in the conditions of their employment, the right to strike and peacefully to picket, and no representative of workers now appears in court to resist an action against them without basing his reliance upon solemn declarations of the Supreme Court of the United States establishing and insuring their rights. Even the great case of the Coronado Coal Company, decided in June of the present year, and holding that an international union may be sued and held liable for the damage caused by unlawful injuries to private rights, in a strike authorized by it, which has been widely denounced as the hardest blow Labor has yet received, may well turn out to be a disguised blessing, first by decreasing the resort to injunctive remedies and second, by giving these great labor organizations a new sense of their dignity and responsibility, and so whetting their desire to place their controversies upon a high plane. Indeed there is already manifested some disposition on the part of unions themselves to adopt the courts as agents for the protection of their rights as in the case of the Garment Workers in New York and as indicated by the Mineworkers' Journal of June 20 which declared editorially:

> If a labor union can be sued as was decided by the United States Supreme Court in the Coronado case, then it can also sue. If a labor union can sue then there is no good reason why it should not utilize the law and the courts for the protection of itself, and its members and its welfare, against oppression, damage or outrage. If the law and the courts afford a means by which union-busting employers may harass, torment and oppress unions and working people, these unions and working people should not hesitate to use the same weapons as against that class of employers. Coal operators secure injunctions to prevent strikes. Labor unions could secure injunctions to prevent lockouts.
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> Numerous coal companies have sued the union for heavy damages for things that happened during strikes. Unions could sue such employers for damages for things they do to their employes. Without any legal right whatever some employers evict families of workmen from their homes and set them and their household goods out upon the roadside to be destroyed by rain and weather. Who will say that damage suits could not be filed against such employers under such circumstances?

With all this body of sound and progressive decision, however, we still face the fact that in the common opinion the courts have not the equipment or the processes for dealing with the causes of these controversies. Mr. Justice Brandeis in Truax v. Corrigan says:

> It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured, not to protect the owner in its use, but to endow property with active militant power which would make it dominant over man. In other words, that under the guise of protecting property rights the employer was seeking sovereign power, and many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the state on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that pending the ascertainment of new principles to govern industry it was wiser for the state not to interfere in industrial struggles by the issuance of an injunction.

It may well be asked why I should undertake to discuss "Labor Relations and the Law" before a body of lawyers, if labor relations are in their nature not subject to legal control. I can only answer that I have endeavored to point out the fundamental difference between cases of this sort and those involving questions of property or personal right between individuals, and the inevitable embarrassment of the courts in being called upon to deal with cases of first impression involving the social readjustments necessary to industrial progress, and practically always involving those surrenders of individual freedom which are involved in social co-operation and the surrender of which is always so passionately resisted on political grounds, however inevitable the logic of progress may make it. I have no doubt whatever that some day all the labor relation questions about which we are now anxious will be fully settled and passed into the category of established rights to be administered by ordinary judicial processes, but the skirmish lines of the conflicting forces of progress will then be entrenched on opposite sides of a new No-Man's Land, and the social and political forces of our people will be debating and deciding a new set of questions.

I shall not take your time to recount in detail the whole series of extra-judicial attempts to find a formula for the solution of these labor problems. The Canadian Industrial Disputes Act and the Kansas Industrial Court Act may be referred to in passing because they involve attempts by legislation to place certain groups of questions in the way of being solved, without interrupting production in vital industries. The compulsory effect of the Canadian Industrial Disputes Act is limited to transportation and mining. It does not prohibit either strikes or lockouts, but postpones either until inquiry, officially made by a board presided over by an officer of the Government, can develop and publish all the facts on both sides. In practical operation this exposition of the justice of the case has had the effect of crystallizing public sentiment on one side or the other, and of course when the public is informed it can always win any strike by giving or withholding its sympathy. The Kansas Industrial Court Act goes somewhat further. It is based upon the doctrine of Munn v. Illinois in that it holds all industries connected with the production, preparation or transportation of the fundamental necessaries of life to be affected with a public use, and therefore legally subject to public control. Undoubtedly the machinery of that act, if it had the confidence and approval of the people of the State of Kansas in a preponderating and effective way, would be able to preserve continuity of

production, and perhaps bring about just and wholesome relations in the industries covered by it. So far the trouble, however, is that the Act has been imposed upon both industry and labor by a public opinion which resents the turmoil and waste of labor controversies, and it is too soon to say whether the court will outlive the prejudice against it and the inherent difficulties of its task.

Several notable attacks upon this problem have been made from a wholly different point of view. Frankly abandoning the obsessions of conflict which have bedevilled these controversies, the Glass Bottle Blowers' Association of the United States and Canada and the union of men engaged in that industry, many years ago entered into an agreement whereby each side selects annually ten representatives to serve on a Board of Arbitration, to which final appeal is made of all difficulties arising in local administration of the agreement through shop committees. The workmen themselves are heard by representatives or in person, and frank and friendly conference is brought to bear upon the differences of opinion or claims of right and wrong. The right to call men out on strike is withdrawn from all local control, and the right to lockout is similarly surrendered. For twenty years this agreement has operated successfully and preserved peace in the industry, so that today both sides agree that relations have been established of confidence and respect, and that action in the industry is preceded by conservative deliberation. Mr. Sherman Rogers says of the men in this industry: "There is no body of workmen in America where the efficiency is greater than in the glass bottle industry. Men work because they know they must work. They know the amount of work they must do to give themselves a decent wage."

Similarly the garment industries of the country have effected agreements; that in New York, being the first in point of time, is known as the Protocol of Peace. It was worked out by Mr. Julius Henry Cohen representing the manufacturers, Mr. Sidney Hillman representing the workers, and their differences were moderated by Justice Brandeis, then Mr. Brandeis. The New York agreement recognizes the principle of trade unionism to the extent of establishing the preferential union shop in the industry. Here in Cleveland a somewhat similar agreement was made which passes over the question of union or non-union. It establishes a Board of Referees, having no interest in the industry either as employer or as employee, who annually establish wage and other conditions and to whom all grievances are finally appealable. Under both of these agreements the right to strike and the right to lock out are surrendered, and the significant novelty in the Cleveland agreement is that the Board of Referees, is, by the joint action of employers and employees, laid under a solemn injunction to consider the public interest as an essential ingredient in all their deliberations.

Here for the first time we have what I think must ultimately come to be recognized as the first principle in all efforts to solve controverted questions of labor relations. It must be recognized first, that there are three parties to every labor controversy—the employer, the employee and the public. Second, it must be recognized that this public interest cannot be left to be injured or destroyed by prolonged conflict between the other two parties or disregarded by both when they combine against it. Recognizing these two principles as funamental we ought to be able to devise industrial arrangements under which the grave problems of seasonal occupation, involuntary unemployment, limitation of output and insecurity of employment will be studied and solved. Such questions are real and vital to the worker. They are equally real and vital to the employer, and wherever they are left unsolved the public finally pays the bill.

The questions here discussed are out of all proportion the largest, most vital and menacing in our current life. Lawyers can create sentiment both in their practice and in their daily contacts in favor of a rational attitude toward these questions. If the people of Cleveland believe effectively in the substitution of the spirit of co-operation for the warlike hostility which now exists, Cleveland can be made a strikeless town. Strikeless, not because of any oppressive or repressive power over either employer or employee, but because public opinion will insist upon honest pay and honest work, a fair chance for industry and a fair chance for the worker. We cannot attain and need not attain ideal conditions, but we can attain easily a situation in which the demand for a rising standard of living will be met by increasing production from confident and contented workers rather than sporadically attained by one group at the expense of another through the coercive power of restriction and violence which those, blinded by the industrial war, at present feel driven to use. In all this the opportunity for lawyers to make their influence felt is obvious and the duty follows the opportunity.

Attack on Bar's Independence

"It is not proposed at this time to consider the merits of the injunction obtained by the United States against the railroad strikers. Granting all that has been said as to the lack of legal justification for the injunctive order, the proposition to impeach the Attorney General for having applied therefor is one of the most monstrous which has ever been presented and is the most direct attack which has ever been made in the United States on the independence of the bar. It is not the case of an executive officer usurping and exercising a power not granted to him. The Attorney General stands on the same basis as any other attorney. A professional act warranting the impeachment of the Attorney General would justify disbarment of a private attorney. The contention for the impeachment of Attorney General Daugherty involves therefore the proposition that an attorney applying to a court of competent jurisdiction on behalf of his client does so at his own peril and is personally liable if the court errs and makes an erroneous order. The nature of the attorney's office places him in a position purely representative. As long as he is not actuated by personal malice and refrains from personal deceit the lack of merit in the client's case imposes no liability on the attorney presenting it. The practice of law would be intolerable under any other rule. An attorney is responsible only for the honest presentation of the facts to the court. It is not for the benefit of counsel that this rule exists, but in the interest of justice that any man claiming a right may have it freely and fearlessly presented to a judicial tribunal. In attacking the Attorney General the representatives of labor have attacked the very foundation on which the professional status of every lawyer rests."—*Law Notes*, November, 1922.

THE BEHAVIORISTIC BASIS OF THE SCIENCE OF LAW

Conditions and Methods of Adjudication Are Essentially Those of Behavioristic Psychology, Which Denies Consciousness Is Necessary Postulate for Explanation of Facts of Life, But This Science Must Employ Other Than Purely Mechanistic Methods for Success in Law Field

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The law is widely based on psychological factors, and any change or development in the science of Psychology has a profound significance for Jurisprudence. The treatment of these factors has heretofore been in terms of Introspective Psychology, which was everywhere unchallenged until within the last two decades. However, the new Behavioristic Psychology has profoundly affected the world of psychological thought and thus has modified thinking in other social science fields, notably those of sociology and history. This article, so far as the JOURNAL *is informed, is the first word on the question: "How will the new psychology when applied to law affect our notions?" This study was undertaken by Professor Malan at the request of the* JOURNAL, *and what it may lack in clearness to readers who have not been thinking along these lines is due to the partial obscurity of all philosophical discussion, and, more important, to the fact that the author is trying to strike out along new paths.*

1. *Nature and Importance of Enquiry.*—The conditions under and the methods by which the Law pursues its aim are, by the very nature of the case, the conditions and the methods of Behavioristic Psychology. The constitutive aims of Legal Science are its own and peculiar to it, but its procedure, methodologically considered, it has in common with the Psychological Science of Behavior. Such, in general terms, is the thesis which the present paper seeks to establish. We intend, in fact, to do some necessary spade-work towards laying the foundation of a Behavioristic Jurisprudence.

The task which we have thus set ourselves is beset with a special difficulty. This arises from the fact that Behavioristic Psychology has but recently dropped its swaddling clothes and is, therefore, not at all as certain of its methods and scope as its devotees pretend. It has pledged itself to an ambitious programme, part of which has, indeed, been most successfully fulfilled; but this is, perhaps, the less important part. The more important part, namely, that which is to interpret behavioristically the higher facts of human life, which Philosophy comprises under the term "spiritual" and which constitutes the stronghold of the Introspectionist, still awaits performance. And it is precisely when Behaviorists, like Grace de Laguna, etc., begin to address themselves to this latter task, that the logical inadequacies in the working assumptions of the more orthodox school of John Watson become apparent. For this reason the present writer (himself a Neo-Realist) finds it necessary to devote a special section to a brief exposition of the behavioristic method, showing in what respects this method must, consistently with its declared character, be extended in order to cope satisfactorily with the more delicate problems of behavior, such as those confronting an ordinary Court of Law. Before doing so, however, a word on the importance of our enquiry seems not uncalled for.

The law as administered by the Law Courts is often felt by the individual to be a highly technical, formal and, indeed, artificial business, frequently violating his sense of justice by its rigid inflexible rules. This complaint on the score of formalism finds dignified expression in the legal maxim, *summum jus summa injuria*, which, interpreted in less learned language, is "the law is a hass." Now, ultimately, the ground for such complaint is to be looked for in the fact that the Science of Law, like any other strict science, must start from certain primary assumptions which restrict both its field and method, and give it what logic calls an "abstract" nature. Most of these assumptions are clearly recognized and observed by the Law Courts under the name of "presumptions." And amongst these presumptions we find a number which relate to mental processes, such as willing, knowing, etc. Thus, a man deliberately attacking another with a weapon which he knows to be lethal is presumed to intend the death of that other; although, if the judge could introspectively examine the accused's mind he may quite possibly fail to detect there the criminal act of will. Or, to take a more striking instance: It is a universally accepted maxim that *"ignorantia legis neminem excusat,"* on which is based the presumption that everybody knows the law; although everybody is intuitively very much aware that this is not so. In cases such as these there is undoubtedly a miscarriage of ideal justice. Now, if our contention that the conditions and methods of adjudication are essentially those of Behavioristic Psychology prove correct, we shall have in the well-tried practices of the Law a valuable test of the validity of the behavioristic standpoint and the efficacy of behavioristic method. On the one hand, the limitations of the science and the practice of Law, as revealed in such presumptions as those we have drawn attention to, would at the same time be the limitations of Behaviorism. The importance for Behavioristic Psychology of having the ex-

istence of these limitations established in such a convincing way would surely be very great. On the other hand, the great scientific achievements of Legal Science would argue a degree of potency in behavioristic method scarcely as yet suspected even by Behaviorists themselves. As regards the Science of Law, how far a behavioristic clarification of juristic method will be found helpful in the solution of its problems the event alone can show.

2. *Standpoint and Method of Behavioristic Psychology.*—It is hardly possible to give an adequate account of the principles and methods of Behavioristic Psychology within the compass of a few paragraphs, even if the writer were himself an accredited Behaviorist. Nevertheless, our purpose demands that we at least indicate its standpoint in broadest outline. Behaviorism, like any new and vigorous theory, has both a negative or militant and a positive or constructive side. Negatively, the doctrine against which it rises in revolt is that of the Introspective Psychologist who postulates the existence of mind or consciousness in final explanation of all the more important facts of human (and, though this does not concern us here, animal) life, comprised under such terms as science, art, politics, society, business, religion, morality, law, etc. According to the Introspectionist all these activities and institutions ultimately originate in, are regulated by, and have value only in relation to conscious processes, like cognition, feeling, volition, desire, etc. To understand these achievements thoroughly, we have to understand the nature and ways of consciousness, and the only method by which we can observe consciousness *directly* is by immediate intuition or introspection. Behaviorism, on the other hand, is the name reserved to itself by that school of psychologists who believe it possible to explain scientifically and evaluate all these things without assuming the existence of such a subjective entity as mind or consciousness at all. The great and insuperable objection which this school has against "consciousness" is, that it is an entity which does not admit of strictly scientific investigation at all. It is a private phenomenon shut up so completely within each organism as to make a direct objective comparison of any two consciousnesses a matter of utter impossibility. Everyone, so it is contended, is, indeed, intuitively and introspectively acquainted with his own mind, and, accordingly, gives conventional names to the various subjective states (e. g., color sensations, feelings, images, etc.), which he discriminates there. But, by the very nature of the case, there is absolutely no means of deciding whether any two individuals ever give the same name to exactly the same mental states, seeing that no person (telepathists excluded) ever has a view for purposes of direct comparison of more than one consciousness, and that his own. The sole and only reason why such names as "red," "c-sharp," "pain," "fear," "war-memory," etc., happen to be given by different individuals to what appears to be approximately the same subjective states is, firstly, that the *external* sensory stimulus (ether and atmospheric waves, and physical, material things generally) which cause or, at least, condition all these states is objectively one and the same, and, secondly, that the *bodily* reactions (muscular and glandular movements) produced by the same stimulus are the same; although, if each could peer into the mind of the other he would, in all likelihood, discover a complete conflict in the inner psychical connotations of the same names. The body-mind correlation is notoriously the obscurest correlation known to science. And it is quite impossible to check by a direct test the truth of another man's introspective verbal reports. Hence, in the interest of a strictly scientific method the Behaviorist takes the bull by the horns, discards "consciousness" altogether, and refuses to recognize any factor in human phenomena but what is objective and open to common experimentation by common methods and instruments, namely, the material stimulus (whether situated within or without the body) and the bodily response (muscular or glandular). This, after all, is all that we ever do directly observe about the personality of our neighbors—speech, be it noted, being nothing but laryngeal and, therefore, muscular activity. Such, at all events, is the line of reasoning which marks the beginnings of the behavioristic venture.

The positive, constructive work to which the Behaviorist is thereby committed is quite definite. Having thus eliminated consciousness and its causality, the characteristic parts and activities of human life are explained solely in terms of stimulus, reaction and their relation, understanding by "stimulus" any factor in the environment of physical bodies animate or inanimate, and by "reaction" any contraction of striped and unstriped muscles, and secretion of the glands. The discovery is made, that the simplest functional unit of behavior is the reflex arc consisting, roughly, of a receptor (sensory end-organ) connected by an afferent nerve with certain nerve centres, whence an efferent nerve leds to an effector (muscles or gland). By virtue of this neurological arrangement a stimulus affecting a receptor automatically produces contractions or secretions. Examples of reflexes are, the narrowing of the pupil in a bright light, secretion of saliva when food touches the lips, knee-jerk when patellar tendon is struck. Now it is held by John Watson[1] that at birth, or shortly after, all the elementary reflex arcs out of which every habit, every instinct, in fact, every emotional, thinking, and volitional activity is formed are functionally present. All later and advanced complex unitary acts (like typewriting, tennis-playing, etc.) are simply integrations of such separate reflexes under the control of complex combinations of stimuli, called the environment. Watson points out that every such unitary act involves the whole organism, that is, reflexes from all parts of the body. Such integrations (unless hereditary, as in instinct) are acquired by learning. In other words, practice and training are the means which consolidate complicated sets of reflexes into habits. An act of behavior, thus conceived, is simply a casual mechanical process starting from the contact of an environmental stimulus (inner or outer) with an end-organ and ending in a response of an effector thereto.

The method thus far described, the orthodox Watsonian method, if one may so name it—is, however, very severely limited in its scientific application. It is, perhaps, true that a large part of every-day behavior conforms to the mechanical habit-type, but all the more important part certainly does not. This truth is struggling to express itself in the writings of certain other Behaviorists, such as G. A. de Laguna, Kantor, etc., although they can hardly be said to have realized its full import as yet. They do not see that their refinements of behavioristic theory and method commit them to what we may call a Behavioristic Phenomenology

1. *Psychology*, p. 272.

of Meaning, in Husserl's sense of the term "Phenomenology."—(a) Firstly as regards the nature of the *control* of behavior, it is evident that the more important activities of life are not determined by stimuli in the defined sense (of physical bodies exciting end-organs by contact) at all: On the contrary, they are controlled by the *meaning* of the physical object whose material stimulus-constituents are in themselves irrelevant and ineffective save as vehicles and supports of the meaning.[2] For example, a sudden bright, red light flashing up before me in the road may automatically produce the blinking reflex, and possibly a train of associated reflexes, but the new and truly adaptive part of my adjustments consists of responses not to the red light at all, but to the *danger* (say, of being run over by a train) of which the red light is merely the signal. A material thing, such as light, instead of functioning as stimulus of a reflex-system may also perform a function of a totally different kind, namely, be the sign or symbol or token of something else which, to adopt a convenient term suggested by Professor Hoernlé, we may call the "significate."[2] The all-important difference is that the stimulus-control must be in direct physical contact with a receptor, while the significant control may be, and usually is, an absent object (indicated in a present meaning) which, in order to be an effective control need not even exist at all. That it is not the red light as such to which adaptive movements take place is shown by the fact that I would have acted in precisely the same way had the sign of danger been a bell, etc. What does vary with the change of physical stimulus are reflexes in the eye and ear mechanisms. But, however the physical stimulus may vary, provided its significance is constant, the significant response has to be (legally) and usually is the same. In fact, so ineffective is the sign as a physical stimulus and so self-sufficient is the meaning as a control, that the former need often not be observed at all. Thus suppose I merely very vividly imagine the whole scene, I will execute the precautionary response only in a rudimentary way. In this case the physical sign of the danger (the bodily correlate of the mental image) is imperceptible except by the aid of delicate instruments. These facts leave no room for doubt as to our conclusion: We have the response a constant, the meaning ("the danger") a constant, but the sign as a material stimulus practically an indefinite variable. Therefore the meaning and not the stimulus is the control of the response.

(b) Secondly as to the nature of the response, if it is thus true that the control of behavior need not be a stimulus, it can be shown to be equally true that the response need not be a reflex (simple or complex). Just as the control may be a meaning "detached" (Kantor) from the physical stimulus, so the response may be a meaning "detached" from the reflex movements. In our above instance my response is the avoidance of danger. Although reflex elements (varying according as I am driving a motor car, riding a horse, etc.) are present in my behavior, yet taken as a whole my avoidance-response is essentially an expression of purpose. By "purpose" we do not mean a psychical act, nor a hidden neural disposition, but an objective relationship or function (in a logico-mathematical sense) of bodily acts. The objectivity of a purpose, aim-and-object, or "Zweck," (which is not the same as "Ends" in the sense of terminus) is demonstrated by the fact that other people apprehend it correctly. Moreover, this objectivity of purpose is of a different order or logical type from that of particular bodily movements. Just as in the equation $y = f(x)$, the function of x (say $\sqrt{x}$) is neither identical with the argument x or any of its values, nor on that account any the less a valid objective relation, so in the ethical, legal, etc., spheres conduct exhibits to the external observer "objectives" or "aims" which he is able to distinguish from the particular bodily movements, as independently valid teleological functions of the latter. Thus the legal definition of the "acts" of theft, fraud, etc., does not consist in a detailed physiological anatomical description of particular bodily acts. In themselves these isolated muscular contractions are indifferent or neutral, neither criminal nor uncriminal. What external observers (the Court) judge criminal about them is some specific expression of intentionality in which they occur. A classification of criminal offences is impossible on the basis of casual reflexes. It is possible only on the basis of behavior which is the purposive expression or function of particular "events" in the organism and the environment. The *expressive* type of behavior is thus distinct from the *causally reflex* type. It embraces all "behavior" in the moral sense of the term, professional, commercial, industrial activities, labour, sport, etc. But the expression is not the only type of significant behavior: We must distinguish another class of such action, which we may describe as *signicative* or indicative.[4] Examples of acts of the latter kind are proper and common names of objects, conventional signals (by flags), signs, algebraic symbols. They are primarily not expressions but entities, themselves indifferent, serving merely to signify or indicate some extrinsic entity or expression. The difference between expressions and indices is that expressions are their own intrinsic meaning, whereas

2. For a list of writings representing this new departure see *Psycological Review*, Jan., 1922, p. 46 (note to article by E. C. Tolman). This is not the place to enter into the question of the meaning of "meaning." Watson (*British Journal of Psychology*, Vol. XI.) denies that there is such a thing as meaning. Let him ponder the moral of the following story:—A farmer entered into a verbal agreement with a native on the first of January to pay him two pounds in wages on the last day of the month. On the 31st of January he pays the native one pound only, justifying his action by the remark that "in speaking it was two pounds but in paying it is only one." The native thereon sued the farmer. The magistrate, a Watsonian behaviorist, decided as follows: "Since there is no such thing as meaning the defendant is bound solely by the words of the agreement. The evidence shows that on January 31st the words, "two pounds," of the agreement were actually present in the defendant's body, in the form of a vestigial, incipient response. This vestigial piece of behavior was the effective stimulus or cause (or at least part of one in the form of a bodily set) of the act of paying one pound. The act is thus fully accounted for by the agreement and by the defendant's bodily adjustments at the dates mentioned, and judgment must be entered for the *defendant*."—We suggest that meaning is the essential thing, that this meaning has priority, and that this priority is not casual but asnological." That is to say, it binds by virtue of its "value" and "validity." We are told that meaning is nothing but an incipient response "projected on" (de Laguna) or "substituted for" (Kantor) the stimulus. But why cannot the incipient response be regarded as effective without projection and substitution (i.e. objectification), if it were not for the necessity of introducing, surreptitiously, the "geltungsmoment" of meaning? Realizing the inadequacy of the vestigial response to account for voluntary action, we might put behind this response a determining tendency (Perry), and behind this the condition of the organism, and behind this the condition of the race, and show how perfectly explicable and neatly in order the act is, when along comes the judge, and behind him the State, condemning the act as out of order, illegal, criminal, as something that *ought not* to have happened! Says Bertrand Russell: "As James states, there is no difference, from the point of view of the external observer, between voluntary and reflex movements" (*Analysis of Mind*, p. 46). No difference! From the standpoint of the judge, which is that of the external observer, it often is the difference between a death sentence and acquittal. If, instead of concerning themselves exclusively with acts in so far as they happen, Behaviorists endeavored to explain acts in so far as they ought not to have happened (offences, torts) they would discover a vast field of external behavior at present apparently *terra incognita* to them.

3. *Proceedings of the Aristotelian Society*, Vol. XXI, A Plea for a Phenomenology of Meaning, p. 78.

4. On this subject the reader should consult Husserl's very able chapters on "Ausdruck und Bedeutung" in his *Logische Untersuchungen*, Vol. II.

indices or signs are merely vehicles of meaning. Expression-behavior is behavior which matters in itself, sign-behavior, on the contrary, is action which is immaterial except in so far as it signifies some matter other than itself. Of course, these two kinds of significant response may become very intimately fused, so much so that there is hardly a significant response which is not both expressive and signicative, although these properties may be present in varying proportions. In singing the musical expression preponderates over the extrinsic meaning of the words sung. In impassioned oratory expression and logical content may be of equal importance. While in algebra expression takes an altogether secondary place relatively to the letter-signs.—Lastly, although, as we maintain, expressive and indicative responses can only be directly evoked by significant controls, yet it does not follow that significant controls evoke only these two kinds of responses. Meaning apprehended is capable of eliciting purely mechanical reflexes. Thus, all the higher instincts are mechanical responses to highly differentiated meanings of objects. The organic disturbances characteristic of emotion illustrate the same automatic effect of meaning. Such reflexes we shall call *quasi-causal,* since the control is not a physical stimulus.—The general theory which the present writer holds may, accordingly, be summarized as follows:—We grant the Introspectionist that mental acts and states are much the best creators and private supports of meaning. At the same time we hold, with the Behaviorist, that bodily acts are to a large extent also extremely good media for expressing and conveying meaning. It is by meaning *only as objectified* and signified by bodily expressions and signs that the relations between individuals are regulated, and not directly by the conscious states as such. And, we contend, since Jurisprudence is an empirical science of such objective relations and norms of conduct it not only may, but in logical strictness must, dispense with consciousness.

3. *The Law and its Sanction.*—The final proof of this contention would demand an exhaustive examination of every department of the Law. From this wide field we select only three topics for purposes of brief demonstration. It is fitting that the first topic shall be one which belongs to the introduction of Jurisprudence, namely, the nature of law in general. We take it as accepted that the only law with which Jurisprudence (as distinct from Political Science) deals are those with which the Courts of Law are concerned. One of the ways in which the Court concerns itself with them is to indicate the physical sanction by which their observance is to be enforced on (actual or would-be) offenders. It follows at once, that enforceability is one of the conditions which rules of conduct must satisfy in order to be law in the juridicial sense of the term. Now, this fact has been made the keystone of a widely current theory as to the nature of law *in general,* i.e. of *all* legal rules without exception. This theory runs more or less as follows:—The state, whatever other function it may perform in addition, is, in its lowest terms, the organ of supreme physical force in a well-organized community. Though many rules of action are observed because of social and moral influences, themselves to some extent under state-control, yet ultimately and in the last resort, the only effective guarantee against violation is this physical power entrusted to and applied under the direction of the Law Courts. And, since only external actions are physically enforceable they must be the only essential constituents of substantive law (comprehending under the phrase "constituents of substantive law," all acts-in-law, all facts-in-law and all acts-of-law provided this latter term be held to exclude procedural acts). This coercion-theory, traceable to Hobbes through Austin, is too familiar to need quotation.[5] It may be summarized in the words of a writer who, on the whole, himself belongs to the Analytical school, T. E. Holland. "A law," he writes,[6] "in the proper sense of the term, is a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority paramount in political society." Note, also, Holmes' definition of an "act" as "always a voluntary muscular contraction and nothing else."[7] The inevitable logical consequence for Jurisprudence of such definitions is the jettisoning of consciousness. They are meant to exclude from the purview of the Law all *merely* subjective mental states, which do not in any way betray their existence in external conduct. Logically, however, they amount to the exclusion of all mental states whatsoever (as we shall presently see). Obviously we have pure and unadulterated *Behaviorism:* The stimulus is some instrument of physical force, the response an external act.

But our would-be behavioristic jurisprudent does not stand by his behavioristic colours for long, and, what is worse, his flight is in logical confusion and disorder. Pressure of space again compels us to cite Holland as typical of the rest. "'Acts' (Handlungen, Actes), in the widest sense of the term, are movements of the will. Mere determinations of the will are 'inward acts.' Determinations of the will which produce an effect upon the world of sense are 'outward acts.'"[8] Page 24 informs us that "internal acts" consist of "mere shapes of the will, irrespectively of their outward manifestations in act." Page 93 continues: "Jurisprudence is concerned only with outward acts. An "Act" may therefore be defined, for the purposes of the science, as 'a determination of will, producing an effect in the sensible world' . . . The essential elements of such an Act are three, viz., an exertion of the will, an accompanying state of consciousness, a manifestation of the will." Which seems a mighty queer reason for holding, in the very next sentence, that "any discussion of the faculty of the will and the mode of its exercise would be here out of place"!! Our author's predicament is, indeed, a desperate one! On the one hand, consciousness must be saved at all costs, otherwise out goes the whole doctrine of liability and the seventy-one pages devoted to the nature of agreements and contracts. On the other hand, consciousness cannot possibly be admitted, since it baffles direct observation in acts criminal or of party. The straw at which he clutches is the phrase "external manifestation or expression of consciousness." Acts unexpressed may safely be discarded. That leaves jurisprudence with two great classes of "external acts," viz., (1), bodily acts not expressing mental states at all, (2), bodily states expressing mental states.

But what, on a scientific analysis can possibly be meant by the external expression of a mental state? Psychologically and psychophysically absolutely noth-

5. Chapter VIII of Rosanquet's *Philosophical Theory of the State* is worth consulting on this theory.

6. Jurisprudence, p. 34 (seventh edition).

7. Common Law, p. 91.

8. Jurisprudence, p. 93.

ing at all! The phrase is nonsensical. Our expressionists seem to believe that by this magical manifestation, psychical, conscious substance somewhow becomes externally perceptible in or on the motor organs of a person like blood from a cut! Of course, I might by analogy *infer* from a man's bodily acts the existence and nature of his conscious states,[9] but apprehend them externally, as I do the facial contortions of his smile or the sound of his voice, I cannot. Apprehended they can only be by being immediately "lived" (Husserl: Erleben) "enjoyed" (Alexander), or experienced, and this the possessor alone can do. To another man they are as imperceptible in the possessor's most expressive as in his most inexpressive bodily acts. The distinction between external acts which "manifest mind" and those which do not is a thoroughly fictitious one. The mystery, however, of this fiction is not an impenetrable one. What is externally expressed and apprehended by others is meaning. Failing to recognize the independent rôle and validity of meaning objectively conveyed, the writers we are criticising must perforce identify it with mind. Meaning is thus reduced to a kind of psychical substance:[10] *What* a man thinks and wills is identical with *his mental acts* of thinking and willing, is as such withdrawn completely from direct external observation, and is, therefore, not investigable by a Court of Law. Yet, as a matter of fact, that is precisely what the Court does take cognizance of and examine most painstakingly. Hence the absurd hypothesis of an expressed mental state! We suggest that the only way out of the difficulty is not to wobble between the introspective and behavioristic standpoints, but to adhere, frankly and persistently, to the behavioristic principle, namely, that the movements of the nerve-endowed organism can, as signs, convey and by their external functions express a very considerable portion of the meaning whose conveyance and expression is currently believed to be the prerogative of consciousness, that we immediately apprehend by the aid of our external senses the meaning which others thus communicate to us, and that no other common medium, least of all any common mental medium, exists through which meaning can become socially effective.

The straits to which our coercion-theorists are driven by their "physical force" and "external act" criteria of the content of juristic law in general show that there must be something radically wrong about the theory. What, then, juridically is the precise explanatory value of the theory? In the light of our account of the method of Behavioristic Psychology in sect. 2, the answer to this question cannot be difficult. In giving it we must necessarily be brief. The subject matter of the Psychology of Behavior may be defined, in the words of J. Watson, as environmental adjustment. The primary factors are, therefore, an environmental control and a response to the control. We have seen (sect. 2) that the control may be either of the nature of a physical stimulus eliciting a response by *material contact* with a receptor, or of a meaning eliciting a response by being *apprehended* through the medium of some receptor. Furthermore, responses also may be of two kinds, viz., (1) reflex (or habit) bodily movements, (2) significations and fulfilments of meanings (aims, etc.). The content of any given law in the juridical sense depends on the behavioristic character of the given control and of the given response. In this section we are considering mainly the control or sanction. We must content ourselves with distinguishing only three types of legal controls, with the three corresponding types of laws.

Type I. Control: a physical stimulus; response: a legally relevant (simple or complex) reflex movement. Examples of such control are: Hanging or electrocution, handcuffing, imprisonment of a habitual criminal, etc. The responses produced are, respectively, total cessation of all behavior (death, inhibition of violent arm-movements, inhibition of all social movements, etc. The point to observe is that these responses are the very bodily acts (negative and positive) which the laws that rely exclusively on these coercive sanctions aim at producing.—Now these are the only kinds of acts—(or rather facts) in law discriminated by the test of the coercion-theory. That test is physical force applied to the body, *which is nothing more or less than what is meant by "stimulus" in the strict behavioristic sense of the term.* The responses thus compellable are mechanical (simple or compound) reflexes. To these only can the law relate if it has to conform to the physical coercion-test. Obviously, the amount of law which is thus accounted for is meagre in the utmost extreme, but the explanation *so far as* it goes is juridically sound.

Type II. Control not the stimulus itself but a meaning supplied by the stimulus. Examples are, spare diet, lashes, most imprisonments (esp. civil). The reflex responses to these physical stimuli are, respectively, emaciation of the body, screaming and writhing of the body, bodily quiescence. But *these reflex acts are quite irrelevant and immaterial to the law.* The purpose of these penalties is to connotatively associate suffering with the environmental factor which is the incentive to the offence. When, on liberation, such a person again comes across the inciting object, the latter has an acquired *meaning* of suffering, to which he responds in a lawful manner.—The coercion-theory might with some stretching be made to cover such laws as these. In actual fact, however, the response is not to a stimulus but to a meaning.

Type III. Control a presupposed meaning. Examples are, discharge or reprimand, any civil judgment (e. g., awarding of damages), any order of court, etc. The offender very often complies with such order, judgment or reprimand as vocally uttered by the judge, without recourse to physical force being necessary. The response is in that case purely and simply to the *logical meaning* conveyed by the words of the judge, in particular, to a reason. Now, of course, the party may yield *because of* and *for the reason that* non-compliance may be followed by physical force. But he may also yield for higher juridical reasons, e. g., on the ground of the justice of the adjudication, or of the maxim *"res judicata pro veritate accipitur."* The points to be emphasized are, firstly, that these are differences in the kinds and values of reasons (or grounds), and not between physical force on the one side and logical ground on the other. Considerations of physical force are of low, considerations of justice and *veritas* are of high value as meaning-controls, but in any case they belong to the realm of meanings. Secondly, it is to be emphasized, that these meaning-controls are strictly juridical, being in some way or other

(*Continued on Page 762*)

9. Husserl maintains that these states are neither "expressed" nor "meant" nor "indicated" but "kundgegeben" by bodily acts.

10. "Psychologismus" the Germans call this fallacy. See Husserl, *Logische Untersuchungen*, Vol. I, ch. III.

GROWTH AND REGULATION OF TREASURY BAR

An Unusual Institution Which Has Come to Have Much Significance for the Profession Generally and Which Has Necessitated the Exercise of Departmental Control Through Rules Laid Down as a Result of Statutory Authority

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WITH the increasing intrusion of federal tax questions into the practice of almost every member of the bar, that unusual institution commonly miscalled "The Treasury Bar" has come to have a growing significance to the members of the profession generally. This is materially evidenced by the fact that since the beginning of record keeping, March 15, 1886, there have been admitted to practice before the United States Treasury Department in the City of Washington and elsewhere approximately seven thousand lawyers in addition to about the same number of "agents," i. e. those deemed qualified for the purpose but not members of the bar. At the present time, applications for additions to this list are being made by members of the profession at the rate of fifteen to twenty per day. With many authorities predicting that the income and kindred taxes are with us to stay and with every Congress considering amendments to existing revenue laws, there is reason to believe that the number of lawyers seeking enrollment before the Treasury Department will continue to be large.

The question as to what attorneys, agents or representatives the Treasury Department shall recognize in the transaction of its business is by no means a new one. Early in the history of the Federal Government representatives of various private and public interests began to appear before the Treasury officers seeking the payment by the Treasury of awards made by other executive departments as well as by branches of the Treasury. As the result of the conveyance by claimants of their claims to their representatives questions began to arise between such claimants and their agents as to which was entitled actually to receive the warrants from the Treasury in payment. Rival agents and attorneys also engaged in such disputes. At first these controversies were not frequent and for years these questions were informally settled by the officers in the Department. However, with the claims for damages, pensions, bounties, back pay, etc., arising out of the Civil War a swarm of individuals, recognizing no ethical restraints, solicited representation of claimants and engaged in the buying and selling of the claimants' rights. As a result of this situation which reached the proportions of a national scandal, the extent of the jurisdiction of Department heads over the representatives of claimants against the United States appearing before the Departments became necessary of a clearer definition.

On October 8, 1866, (12 Op. Atty. Gen. 66), Attorney General Stanbery, replying to an inquiry from the Secretary of War, who evidently was being somewhat irritated by the conduct of certain claim agents in connection with his department, delivered an opinion on the subject. The Attorney General held that with respect to the Act of July 28, 1866 (providing certain bounties for private soldiers), the Secretary of War, in the absence of express legislative action, had no power to refuse to recognize the agent or attorney designated by the claimant. However, somewhat later when the Inspector General of the War Department had uncovered the perpetration of numerous frauds by claim agents upon discharged negro soldiers at Memphis, Tennessee, Attorney General Hoar went more fully into the question of a Department head's jurisdiction over attorneys and agents appearing before his department. In Attorney General's Opinion Vol. 13, p. 150, 153, the Attorney General recognizing the soundness of the Stanbery opinion, declares that opinion is no limitation on the power of a Secretary to deal with fraudulent practices. It is pointed out that the power of the Secretary under such circumstances is a natural one arising from the necessity of the protection by the Secretary of the public interest committed to his charge. Says the Attorney General:

> He (the Secretary) is not bound to recognize or to do business with any claim agent who is known to have perverted his vocation for the purposes of fraud, and whose character is such that a reasonable degree of confidence cannot be placed in his integrity and honesty in dealing with the Government. Such, I am informed, has long been the practice of the Departments, and it is founded upon the very necessity that exists for its adoption in administering the laws relating to the settlement and payment of claims upon the Government, as a safeguard against fraud.

The opinion makes no reference to the authority conferred upon the Department head in the first session of Congress, by the Act of July 27, 1789, C. 4 (1 Stat. 28; Rev. Stat. Sec. 161), ". . . to prescribe regulations, not inconsistent with the law, for the Government of his Department. . . ."

The War Department apparently was not the only government office having trouble with those doing business before it and in 1870 on the occasion of the passage of a general Patent Office bill, the principle announced by Attorney General Hoar was amplified and incorporated in the statutes altho confined in application to the Commissioner of Patents and the Secretary of the Interior. This act, that of July 8, 1870, c. 230, sec. 19 (16 Stat. 200; Rev. Stat. Sec. 483) provides as follows:

> The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may from time to time establish regulations, not inconsistent with the law, for the conduct of proceedings in the Patent Office.

Section 19 of the same Act (Rev. Stat. Sec. 487) provides:

> For gross misconduct the Commissioner of Patents may refuse to recognize any person as a patent agent, either generally or in any particular case; but the reasons for such refusal shall be duly recorded, and be subject to the approval of the Secretary of the Interior.

This last section seems to be the first statutory specific empowering of an administrative officer to

accept or disbar an agent or attorney in accordance with rules laid down by an administrative officer.

The officers in other Departments seem to have been left to get along as best they could without enabling legislation until June 1, 1872, when the Act of that date, c. 256, Sec. 5; (17 Stat. 202; Rev. Stat. 190), was passed to restrain the activities of former employees of the Departments who were going into the "claims business." This act reads as follows:

> It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employee in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee. (Sec. 190, Revised Statutes.)

To digress for a moment from the chronological development of the subject, it is worthy of note that this fifty year old act is just at present of rather vital importance to the small army of former employees of the Bureau of Internal Revenue who are specializing in federal tax practice. The Commissioner of Internal Revenue has but recently informed the writer in response to his request, that on the authority of 31 Opinions of the Attorney General, 472, the Commissioner interprets the word "Departments" as used in the foregoing section as meaning "Executive Departments in Washington, D. C."

In 31 Op. Atty. Gen. 472 (the opinion referred to by the Commissioner) it was held that an officer of the United States Army, as such, is not an officer or employee of a "Department" within the meaning of the quoted section. In reaching this conclusion, Attorney General Palmer quotes from the opinions of the Judge Advocate General of the Army and of the Comptroller of the Treasury. He also quotes with approval from the opinion given in 15 Op. Atty. Gen. (262, 267) construing the statute authorizing the use of the government's "penalty envelope." The quoted language of the earlier opinion includes the following:

> The several Executive Departments are by law established at the seat of Government; they have no existence elsewhere. Only those bureaus and offices can be deemed bureaus or offices in any of these Departments which are constituted such by the law of its organization. The Department, with its bureaus or offices, is in contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. Thus, the office of postmaster, or collector of internal revenue, or of pension agent, or of consul, is not properly a *Departmental* office —not an office *in* the department having supervision over the branch of the public service to which it belongs.

In view of the extensive field work now carried on by the Bureau of Internal Revenue for instance, there may be still some question as to how far the language just quoted may be applicable to individuals formerly employed by a Collector or an Agent in Charge engaging in tax practice before the Treasury Department.

It has been said that the word "claim" as appearing in the Act of June 1, 1872, quoted in the foregoing, may be open to some dispute. The Income Tax regulations issued by the Bureau refer to three principal kinds of claims, i. e. Claims for Refund, wherein the taxpayer is endeavoring to recover taxes paid by him, alleging that the payment was in error, or the collection was illegally made; Claims for Credit, wherein the taxpayer seeks to have credited against subsequent assessment taxes which he alleges were paid in error or were illegally collected; and Claims in Abatement, wherein the taxpayer alleges that an assessment is incorrect. Obviously, there is a difference between a contention that the United States owes the taxpayer because of an improper collection of taxes and the contention that the taxpayer does not owe the Government what the Bureau of Internal Revenue claims. Some, and perhaps all, of the former employees of the Bureau of Internal Revenue, take the position that if, while employees of the Department, they had no actual personal knowledge of the facts relating to a claim in Abatement, that they are not barred from representing the taxpayer making the protest under the heading.

The position of these former employees with reference to the meaning of the statutory word "claim" would seem to be supported by the Commissioner of Internal Revenue who has written:

> With respect to the construction placed by the Department in the word "claim" as used in Section 190, Revised Statutes, you are advised that in the leading case of Hobbs v. McLean, (117 U. S. 567) it was stated, "It is well understood that a claim against the United States is a right to demand money from the United States." This definition of claim against the United States has been followed in later Federal cases as in Milliken v. Barrow (65 Fed. 888,894) and has been held by this office to apply to the words "claim against the United States," as used in Section 190, Revised Statutes.

After the act of June 1, 1872, the next legislation by Congress on the subject was in July, 1884. As the result of a report made to Congress on May 7, 1884. by the Secretary of the Interior, stating that he had been forced to disbar three hundred and twelve "agents" operating before the Pension Office, Congress passed the Act of July 4, 1884, c. 181, sec. 5 (23 Stat. 101), giving him specific power to prescribe rules and regulations for the recognition and disqualification of agents, attorneys and others representing claims before the Department. Inasmuch as the same agents or attorneys operating before the Department of the Interior in the normal course would appear before the Treasury Department to follow the payment of awards, Congress conferred substantially the same power on the Secretary of Treasury in the Act approved July 7, 1884, c. 334, sec. 3 (23 Stat. 258), reading as follows:

> That the Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the representation of their cases. And such secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

It is upon the authority granted by this act that the Secretary of the Treasury has promulgated the extensive rules governing the practice before the Treasury Department of attorneys and agents, as set forth in Circular 230. This circular first appeared February 15, 1921, announcing among other things the appointment of a Committee on Enrollment and Disbarment, was amended June 7, 1921, July 21, 1921, December 23, 1921, and finally rather drastically revised April 25, 1922. This document may be had upon application to

the Treasury Department. Its possession is a highly essential requisite for any member of the bar expecting to represent a client before the Department.

Prosecution of claims against the United States by persons holding any place of trust or profit or discharging any official function under, or in connection with any Executive Departments, or the Congress, is effectively prevented by the Act of March 4, 1909, c. 321, sec. 109 (35 Revised Stat. 1107). It is noteworthy that, in contrast to the Act of June 1, 1872, barring former employees from presenting claims but attaching no penalty for disobedience, this act of 1909 relating to employees still in the service carries as a penalty for its infraction a fine of not more than five thousand dollars or imprisonment for not more than one year, or both.

This section has been interpreted to apply to: retired officers of the army (Tyler's Motion v. U. S., 18 Ct. Cl. 25; In re. Winthrop, 31 Ct. Cl. 35); the Commissioner of Deeds of the District of Columbia (28 Op. Atty. Gen. 131); an internal revenue storekeeper (Angell v. Rowlett's Admir., 4 Ky. Law Rep. 909); and counsel for delegates to the Pan-American Conference (23 Op. Atty. Gen. 533). The prohibition has been held not to apply to an assistant attorney of the District of Columbia (18 Op. Atty. Gen. 161).

While several bills have been presented to Congress extending the restriction on former government employees these have all died in the process of legislation with the exception of the following rider to the Army appropriation bill contained in the Act of July 11, 1919, 41 Stat. 131:

> That it shall be unlawful for any person who, as a commissioned officer of the Army, or officer or employee of the United States, has at any time since April 6, 1917, been employed in any Bureau of the Government and in such employment been engaged on behalf of the United States in procuring or assisting to procure supplies for the Military Establishment, or who has been engaged in the settlement or adjustment of contracts or agreements for the procurement of supplies for the Military Establishment, within two years next after his discharge or other separation from the service of the Government, to solicit employment in the presentation or to aid or assist for compensation in the prosecution of claims against the United States arising out of any contracts or agreements for the procurement of supplies for said Bureau, which were pending or entered into while the said officer or employee was associated therewith. A violation of this provision of this chapter shall be punished by a fine of not more than $10,000, or imprisonment for not more than one year, or both.

While not applying to the Treasury Department, directly, this statute would necessarily disqualify any attorney or agent who came before that Department pursuing an award made in a claim against the United States, in which the agent or attorney represented a claimant in violation of the prohibition contained in the statute.

The only other legislation of importance intended to exercise direct statutory control of individuals appearing in a representative capacity before the Executive Departments is contained in the Act of June 29, 1906, 34 Stat. 622, prohibiting, in substance, notary publics from performing their functions as notaries in connection with matters pending before the Departments in which they are employed as attorneys or agents or are interested parties.

In general the control over attorneys and agents appearing before the Department is exercised by the Departments heads through rules laid down as the result of authority conferred upon them by the statutory enactments which have hereinbefore been set out. In spite of sporadic agitation to the contrary, most of the governmental officers dealing with the situation at present seem to be satisfied with the powers given by the existing laws. The reason for this feeling would seem to lie in the fact that the existing statutory authority is broad enough to permit of regulations which can be made sufficiently comprehensive to prevent continued improper practices on the part of any one individual even though a single offense might not be reachable by the authorities. It is hardly a paying proposition to incur the settled ill-will of the forum before which one regularly appears. Just now it seems unlikely that new legislation will be requested, at least by the Treasury Department, to control its "bar," although occasional amendments to the regulations for the purpose may be expected.

Speaking of Lady Solicitors

"During the coming term we shall have lady solicitors. As an admirer of the fair sex, I hope they will receive from the reputed sterner sex that courtesy and encouragement which is their due. Although there may be some cases in which lady solicitors may do good and effective work, I cannot help thinking (though I speak with bated breath) that ladies by their character and temperament are not built for the rough-and-tumble life and work of the ordinary solicitor, and that they would be far better employed in attending to homework and the bringing up of future generations of solicitors of the male sex.

"Portias will, I am afraid, be few and far between; but now that the fair sex have got the entrée to the profession, it behooves the male sex to look to its laurels. What mixups may be looked for—solicitor marries solicitor? Will the male client want to consult the female solicitor and vice versa? Situations may arise which are altogether too complicated to contemplate. If any lady friend of mine asks for my opinion as to entering the Profession, my advice will be the same as *Punch's* to those about to marry—'Don't.'"—From Presidential Address to Law Society, *The Law Times*, Sept. 30.

Popularizing Jury Service

"The Supreme Court of Washington, in State v. Bucham, 187 Pacific Reporter, 352, points a way to an oasis where the thirsty may indulge legally and without hazard. The court advises serving on the jury; for in the above-mentioned case the judges hold that, in a prosecution for unlawfully having in possession intoxicating liquors, it was not error to send to the jury room twenty-four bottles which had been introduced in evidence, nor was it error for the jury to smell and sample it."—*Virginia Law Register*, September, 1922.

Proctor Knott's View of His Reputation

"Mr. Knott's reputation as a humorist was not a source of unmixed pleasure to them. He fancied that it impaired his reputation both as a lawyer and as a statesman. When Cleveland was making his race for President in 1892, Mr. Knott was asked to make some speeches for him in Indiana. At one of his appointments he was greatly disgusted to see on a billboard in very large letters the announcement of a speech to be made on that afternoon by Knott, the funny man. Whatever adjective might be used to define his profound sense of humor, funny was not the word. Although his humor was a never-failing delight to his friends, like all humorists he was a man whom melancholy had somewhat marked for its own."—From address of Judge Hazelrigg at the 1922 Meeting, Kentucky State Bar Association.

SOME AMERICAN CAUSES CELEBRES

II. ATTORNEY GENERAL OF MASS. v. TUFTS

By JOHN LOWELL
*Of the Boston, Massachusetts, Bar**

Few cases of recent years have been regarded as having a more significant bearing on the proper administration of Justice than that of Attorney-General vs. Tufts. In its ramifications and connections it seemed to involve or at least touch revealingly the whole complicated process of delay, official dereliction, influence and the like by which the due course of Justice is impeded or thwarted in criminal cases. The action of the Supreme Judicial Court of Massachusetts, as set forth in the following article, was generally regarded as a signal and salutary vindication of correct standards of official conduct.

I HAVE been asked to give some account in the AMERICAN BAR ASSOCIATION JOURNAL of the recent case of Attorney-General v. Tufts, 239 Mass. 458. It was my first intention to review in detail the Barney case so-called, as it was Mr. Tuft's actions in that case which in part led to the investigation resulting in his removal from the office of District Attorney, but I decided instead to summarize that case and some of the other more illuminating cases.

Members of the bar are generally aware that for many years there has been a class of attorneys who devote themselves almost entirely to the criminal law. This class of attorneys is akin to another class almost equally pernicious who are largely engaged in exploiting accident cases. The first essential function of the so-called criminal attorney is not to try cases to the end that justice may be done. He is, on the contrary, a broker in crime. Unfortunately, certain conditions in the criminal law today offer him a profitable market. The increasing numbers of statutes creating new crimes has largely increased the number of criminal cases to be tried. By reason of this increase, a considerable number of cases are certain never to be tried at all. The criminal attorney in part trades upon this situation. With an honest district attorney, he trades upon the crowded condition of the criminal docket. With the dishonest district attorney, he seeks through influence and otherwise to make a deal by which his client shall either escape punishment altogether or receive a disapportionate penalty.

The wide discretion vested in district attorneys subjects them to unusual temptations. Until the passage of a recent statute in Massachusetts (a Massachusetts law not in force at the time when Tufts' case came up), a district attorney could enter *nolle prosqui* without even assigning a reason therefore. Even when a case had been tried and had come up for disposition and sentence, the large number of cases to be disposed of has frequently led the Court to rely upon and follow, to a great extent, the recommendation of the district attorney.

Although for many years the Attorney-General of Massachusetts had ceased to take active part in the prosecution of crime, such prosecution having been actually conducted by the district attorneys of the nine districts, he still retained the powers of the chief prosecuting officer of the Commonwealth. Moreover, a statute passed shortly after the adoption of the Constitutional Amendment which made the office of district attorney an elective office, provided that the Supreme Judicial Court, "if sufficient cause is shown therefore, and it appears that the public good so requires, may, . . . remove . . . a district attorney." It was under this statute that the proceeding against Mr. Tufts was brought.

Nathan A. Tufts was considered by many a man of unusual promise. He was a graduate of Brown University; he was known to thousands of college men as a vigorous and upright official whose services were in frequent demand as a football referee. In 1915 and 1916 he was a member of the Massachusetts Senate for the Fifth Middlesex District. In November, 1916, he was elected by a large majority to be district attorney and assumed office on January 3, 1917. He was re-elected in November, 1919, and again qualified to hold office on January 7, 1920. As early as May or June, 1917, Tufts seems to have been connected with a corrupt ring, as was disclosed in the Mishawum Manor case, so-called, but sufficient evidence was not obtained until May, 1921, to warrant a proceeding against him.

On May 30, 1920, one Herman L. Barney, who had been convicted of manslaughter in connection with the theft of an automobile and sentenced to state prison for a long term of years, escaped from that institution in company with one Manster. After remaining hidden for some days, he made his way to a refuge in the city of Northampton. While he was concealed in Northampton word was brought to Mr. Tufts that Barney might be induced to surrender. Mr. Tufts undertook negotiations with this escaped convict, visiting him secretly on two or three occasions—one occasion in the dark in a railroad station in Northampton —and ultimately induced him, upon certain agreed terms, to return to state prison. The facts in regard to this transaction are vividly set out in the opinion of the Court in the Tufts decision and need not be stated at length here. What induced Tufts to act as he did in this case has never been disclosed. It may not, however, be without significance to observe that on the evening when he returned with Barney he gave out to the press an elaborate account of the transaction which was deliberately false in several particulars, as the Court in its opinion finds. Another significant fact is that when requested by the Commissioner of Corrections to tell where he found Barney and the circumstances, in order that the Commissioner might, if possible, secure a clew which would lead to the apprehen-

*Mr. Lowell states that he is indebted to Mr. E. H. Abbott, Jr., one of the Assistant Attorneys General, for his assistance in the preparation of this article.

sion of the other convict, Manster, Mr. Tufts ignored the request for reasons which the Court characterized as flimsy and unworthy of a district attorney. We may, therefore, infer that in this transaction, Mr. Tufts had some personal end to serve, that he was not actuated by public spirit or the desire to discharge the duties of his office, but each one of us is left to infer what that motive may have been.

Even prior to the Barney case, there had been complaints as to the manner in which cases involving automobile thefts had been handled in Middlesex County. A large number of these cases had not been brought to trial. The notoriety which attended the Barney case, which had its original inception in an automobile theft, called additional attention to these unsatisfactory conditions.

On September 25, 1920, Attorney-General J. Weston Allen, appointed Mr. Henry F. Hurlburt, one of the leaders of the Boston Bar, a special assistant attorney-general, which appointment was approved on the same day by the governor and council. Massachusetts owes a great debt of gratitude to Mr. Hurlburt, who for almost a year laid aside the greater part of his practice and at pecuniary sacrifice took up this work Mr. Hurlburt immediately took up the investigation and prosecution of automobile frauds and related matters in Middlesex County. In the course of this investigation he examined thoroughly into the circumstances surrounding Barney's escape from and return to State Prison. He set out the facts which he had discovered in a report to Attorney-General Allen, which report Mr. Allen incorporated in his own report to the Legislature, which was submitted to that body in 1921.

The situation which Mr. Hurlburt by personal examination uncovered in Middlesex County made it evident that proceedings ought to be brought against Mr. Tufts, if sufficient evidence to support those proceedings could be obtained. From January until May, evidence was sought in every quarter from which it was thought that evidence could be obtained, the investigation being made under the personal direction of the attorney-general and Mr. Hurlburt. It became evident that such an investigation would be materially helped by additional powers from the Legislature. Bills to that end were introduced which were violently opposed by those who for their own selfish ends desired conditions to remain as they were. Even the power of the Attorney-General to appear and present a case before the grand jury was denied and it required a decision of the Supreme Judicial Court of Massachusetts, Commonwealth v. Kozlowsky, 238 Mass. 379 (which was argued in March, 1921, and decided in May of that year) to establish that he still possessed this power. It is perhaps not without significance that the District Attorney of Suffolk County filed in that case a brief as *amicus curiae* in opposition to the Attorney-General, and that at the same time a bill was introduced in the Legislature designing to take away this power if it were still possessed. The latter bill was given leave to withdraw.

On May 25, 1921, the information against Mr. Tufts was filed in the Supreme Judicial Court. The proceeding was a novel one. Although the law had been upon the statute books from 1857, no District Attorney had been removed thereunder for misconduct. There was one case, Commonwealth v. Cooley, 1 Allen 358, in which a district attorney, hopelessly insane, had been removed substantially without opposition. Mr. Tufts attacked the constitutionality of the law upon numerous grounds and also moved to limit the scope of the inquiry to matters done by him officially during his last term of office. The Court, after full argument of both sides and filing of briefs, upheld the law and refused so to limit the scope of inquiry.

The trial upon the merits began on July 11 and continued up to and including August 11, 1921, before five justices of the Supreme Judicial Court sitting *en banc*. I believe that this is the only trial *en banc* before the full Court which has been had since jurisdiction of capital cases was transferred to the Superior Court a good many years ago. The allegations of the information covered some seventy-five pages of the Report. Space does not permit that the information shall be analyzed in detail here. I can only refer to a few of the more important charges.

The first charge to be taken up was the Barney case, of which the essential facts have already been stated. Those who desire a fuller account will find a terse and vigorous statement in detail in the opinion of the Court.

The next charge was the so-called Mishawum Manor case, about which a few words may profitably be said in illustration of what has already been stated in regard to a venal district attorney and the methods of operation employed by those who make a living as brokers in crime.

On March 7, 1917, a banquet was held at a leading Boston hotel in honor of one well-known movie star, Fatty Arbuckle. At the conclusion of the banquet a few of the guests were taken to a house of ill fame in Woburn, known as Mishawum Manor. The Court summarized what took place there as "an orgy of drink and lust." In May, 1917, the keeper of the house of ill fame was prosecuted in the District Court in Woburn. It is perhaps significant that the particular transactions upon which the prosecution was based were the events which occurred on the 7th of the previous March, and the record of the Tufts case disclosed that the inquiries in the District Court in connection with the prosecution were largely directed towards establishing the identity of those who attended it. The trial received some notoriety in the public press and as a result one of the guests was summoned to Boston by telephone by the mayor of Boston in connection with the affair. When this guest arrived in Boston he conferred with Mr. Daniel H. Coakley. On the next day the New York guest and certain others were taken by Mr. Coakley to see Tufts. About June 1 summons were issued, one of which was withdrawn and the other never used, and on June 5, pursuant to arrangements made a few days before, there were negotiations consummated by which a large sum of money was paid to prevent and suppress further proceedings.

The next case to be summarized is the case of Morse, keeper of the Mishawum Manor, known also as Kingston, alias Kennedy. That fact Tufts either knew or ought to have known. The defendant was defaulted in both cases. Thereafter the office in charge of the cases asked Tufts for a *capias* for the arrest of the defendant, saying that he thought he could find her and bring her in with a *capias*. This *capias* Tufts refused to have issued. It seemed from the evidence that the woman had left the Commonwealth and her whereabouts were unknown to the officers. . . . It was proved that the officer who asked

(*Continued on Page 771*)

REVIEW OF RECENT SUPREME COURT DECISIONS

Japanese Born in Japan Not Within Terms of Naturalization Statute—Due Process and Liability of Initial Line for Safe Freight Delivery—State Statute Making Carriers Liable for Reasonable Attorney's Fees for Claim Collection Construed—Interstate Movement in Commerce—Hail Insurance Law Decision—Mandamus—Party Wall Statutes—Real Estate Brokers' License Act—Federal Income Tax

By Edgar Bronson Tolman

Aliens Naturalization

Persons of Japanese race, born in Japan, are not eligible to naturalization, as they are not "free white persons" within the meaning of the statute.

Section 2169 of the Revised Statutes, thus restricting the right of naturalization, limits the Naturalization Act of June 29, 1906.

Ozawa v. United States, Adv. Ops. 11, Sup. Ct. Rep. 65.

This is the most important of the first group of opinions handed down by Mr. Justice Sutherland since his appointment to the bench of the Supreme Court. In it that court expresses itself definitely as to the eligibility to citizenship, under present statutes, of Japanese persons born in Japan.

The appellant was a Japanese concededly well qualified by character and education for citizenship. The District Court of Hawaii held that he was ineligible to citizenship, and when appellant brought the case to the Circuit Court of Appeals for the Ninth Circuit, that court certified to the Supreme Court the following three questions:

> 1. Is the Act of June 29, 1906 (34 Stats. at Large, Part I, Page 596), providing "for a uniform rule for the naturalization of aliens" complete in itself, or is it limited by Section 2169 of the Revised Statutes of the United States?
> 2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the Naturalization laws?
> 3. If said Act of June 29, 1906, is limited by Section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

The Supreme Court held that the Act of June 29, 1906, was limited by Section 2169, and answered the other two questions in the negative.

Mr. Justice Sutherland delivered the opinion of the Court. He first addressed himself to the question whether the Naturalization Act of 1906 was limited by the provisions of Section 2169, Revised Statutes, reading as follows:

> The provisions of this title shall apply to aliens, being free white persons and to aliens of African nativity and to persons of African descent.

He made clear that the Act of 1906 dealt primarily with matters of procedure, and that as there was nothing in Section 2169 repugnant to the Act, there was plainly no repeal of the Section by implication. But appellant contended that as Section 2169 declared that "the provisions of *this Title* shall apply to aliens being free white persons. . . .", it should be confined to the classes provided for in the unrepealed sections of that Title, namely certain honorably discharged soldiers and sailors. He further contended that the Act of 1906, thus construed, conferred the privilege of citizenship without limitation of race, because of the general introductory words, "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise."

These latter words, the learned Justice pointed out, related not to the subject of eligibility, but to the method of procedure. He said further:

> **The argument that because Section 2169 is in terms made applicable only to the title in which it is found, it should now be confined to the unrepealed sections of that title is not convincing. The persons entitled to naturalization under these unrepealed sections include only honorably discharged soldiers and seamen who have served three years on board an American vessel, both of whom were entitled from the beginning to admission on more generous terms than were accorded to other aliens. It is not conceivable that Congress would deliberately have allowed the racial limitation to continue as to soldiers and seamen to whom the statute had accorded an especially favored status, and have removed it as to all other aliens. Such a construction can not be adopted unless it be unavoidable . . .**
>
> **The words "this title" were used for the purpose of identifying that provision (and others), but it was the *provision* which was restricted. That provision having been amended and carried into the Act of 1906, Section 2169 being left intact and unrepealed, it will require something more persuasive than a narrowly literal reading of the identifying words "this title" to justify the conclusion that Congress intended the restriction to be no longer applicable to the provision. . . .**
>
> **We are asked to conclude that Congress, without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words of Section 2169, which section we may assume was continued for some serious purpose, has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national policy by a century of legislative and administrative acts and judicial decisions would have been deprived of its force in such dubious and casual fashion. We are, therefore, constrained to hold that the Act of 1906 is limited by the provisions of Section 2169 of the Revised Statutes.**

Coming to the question of the eligibility of appellant under Section 2169, he turned to appellant's contention that as the words "free white persons" were first used in 1790 solely to exclude Negroes and Indians, they should still be given that meaning. He said in part:

> **The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular**

races been suggested the language of the Act would have been so varied as to include them within its privileges.

Who then, are "free white persons?" Referring to the authorities cited in argument, he continued:

> It is sufficient to note the fact that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, in *In re Ah Yup*, 5 Sawy. 155 (1878), the federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race (citing cases). With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested.

Difficult questions as to just who is a "person of the Caucasian race," the learned Justice said must be determined as they arise from time to time. In conclusion he said:

> The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

In *Yamashito v. Hinkle*, Adv. Ops., Sup. Ct. Rep., the same question was presented by an application for writ of mandamus to compel the Secretary of State of the State of Washington to file articles of incorporation of a real estate corporation. The Secretary of State had refused on the ground that the applicants were members of the Japanese race, and, as not eligible to citizenship, not qualified under Washington statutes to form the proposed corporations. The case was decided upon the authority of the *Ozawa* case *supra*, and the judgment affirmed.

Mr. Geo. Wickersham argued for the appellant in the Ozawa case, and Solicitor General Beck and Special Assistant to the Attorney General Wheat for appellee.

Carriers—Due Process

A state statute making the initial railroad of two connecting railroads receiving freight liable for safe delivery by the other, does not deny due process of law.

A state statute making every common carrier liable for a reasonable attorney's fee for collection from it of every claim not adjusted within sixty days, does not violate the Fourteenth Amendment. But a provision is invalid which requires a carrier that succeeds in having the claim reduced on appeal to pay claimant's attorney's fees on that appeal.

Chicago & Northwestern Ry. Co. v. Nye Schneider Fowler Co., Adv. Ops. 46, Sup. Ct. Rep. 55.

The Nye Schneider Fowler Company, a Nebraska corporation, brought suit against the Chicago & Northwestern Railway Company for damages to one hundred and five intrastate shipments of hogs. The shipper asked damages in the sum of $2,097.21 and $900 attorney's fees. The jury returned a verdict of $802.27 with 7% interest as provided by the statute, and the court fixed the reasonable attorney's fees to be paid by the defendant at $600. The railroad appealed to the Supreme Court of Nebraska; and that court required a remittitur for $209.01 and reduced the fee to $200. But the court charged the railroad with an additional attorney's fee of $100 for services in the Supreme Court, and accordingly entered judgment. The railroad brought the case on writ of error to the Supreme Court of the United States, challenging the constitutionality of the Nebraska statute making the railroad liable, as initial carrier, for the safe delivery of freight by the connecting carrier, and also the validity of the state statute under which attorney's fees were charged to the defendant. The Supreme Court held that the first statute was valid, but that the second was in part invalid, and to that extent reversed the judgment.

The CHIEF JUSTICE delivered the opinion of the court. The first statute in question was as follows:

> Any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers. Whenever two or more railroads are connected together, the company owning either of such roads, receiving freight to be transported to any place on the line of either of the roads so connected shall be liable as common carriers for the delivery of such freight, to the consignee of the freight, in the same order in which such freight was shipped.

The Nebraska Supreme Court had held that in cases covered by this statute the initial carrier had a right of reimbursement under the general principle of subrogation. The contention of the plaintiff in error was that the legislature had in fact granted no such right, that it was purely a matter of equity under the circumstances, and that hence the railroad thus made liable was deprived of its property without due process of law. This argument was disposed of in the following words:

> We can not follow this distinction. We have here a construction of this statute by the Supreme Court of the State, in which that tribunal holds that under all the circumstances to which this statute can apply, subrogation does exist. The initial carrier is, therefore, certainly protected within the jurisdiction within which the statute operates, and as no doubt can arise as to the enjoyment of the right, it is immaterial whether it was originally founded on the common law or was developed in the broader justice of equity jurisprudence.

The second statute in question, too long to set out here in full, in substance provided that if any common carrier failed to adjust and pay any freight claim (properly presented in accordance with the statute) within sixty days as regards intrastate shipments or within ninety days as regards interstate shipments, and if the claimant recovered a judgment in excess of the amount offered by the carrier to settle the claim, then such carrier should be liable for 7% interest on the claim from the date of filing, and for a reasonable attorney's fee to be fixed by the court. Furthermore,

"in the event an appeal be taken and the plaintiff shall succeed," the statute provided that the plaintiff should be entitled to an additional attorney's fee.

It was argued by the railroad company that as this statute imposed costs on the defeated defendant but not on the defeated plaintiff, it discriminated unjustly, denied the company the equal protection of the laws, and took its property without due process of law. The learned Chief Justice reviewed nine cases in which the Supreme Court had had occasion to pass on statutes of this character, and then said:

> The general rule to be gathered from this extended review of the cases is that common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet the liability for injuries inflicted upon the property of members of the public in their performance; that the seasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees. But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and "violate the rudiments of fair play" insisted on in the Fourteenth Amendment, will be held to infringe it. In this scrutiny of the particular operation of a statute of this kind, we have sustained it in its application to one set of facts by the state court and held it invalid when applied to another. . . .
>
> It is obvious that it is not practical to draw a line of distinction between these cases based on a difference of particular limitations in the statute and the different facts in particular cases. The Court has not intended to establish one, but only to follow the general rule that when in their actual operation in the cases before it, such statutes work an arbitrary, unequal and oppressive result for the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect of state legislation, they will not be sustained.
>
> Coming now to the case before us, we find that the statute affects all common carriers, that it imposes on them the duty of considering and settling claims for loss of and damage to freight within sixty days, and provides that if they do not so settle them and in a subsequent suit more is recovered than the amount tendered, the amount found due shall carry 7% interest from the presentation of the claim as a penalty and reasonable attorney's fees. If an appeal is taken and the plaintiff succeed, an additional attorney's fee may be included. The statute is confined to freight claims. It does not place a limit on them, but as we have seen, the cases do not require this. The statute does require a tender but in this case the claims were wholly rejected. No tender of any amount was even attempted. The claims numbered 105 when presented and sued on. They were reduced to 72. The trial lasted four days.
>
> It is said here as it was said in the *Polt* case in 232 U. S. 165, that the company can not be subjected to a penalty for not guessing rightly the verdict of a jury. But the cases are very different. There the penalty was double damages for a failure to guess rightly as to the jury's view of damages from a fire to a house when the extent of the damage was not peculiarly within the company's knowledge. Here the damages were for hogs injured during the custody of the carrier and whose value was determined by weight and market price and not difficult of ascertainment after a bona fide effort and there was no effort at a tender at all. Here the penalty is only 7% interest on the actual recovery and reasonable attorney's fees as costs. The amount of the attorney's fee $200 for a case involving the preparation of 72 different claims and a four days' trial does not shock one's sense of fairness.

The Supreme Court of Nebraska had construed the words "and in event an appeal be taken, and the plaintiff shall succeed, such plaintiff shall be entitled to recover an additional attorney's fee" to refer to success in securing a judgment for more than the amount tendered, and hence had required the railroad to pay plaintiff's attorney's fee in the upper court, although the railroad had there succeeded in having the amount of the judgment reduced. The learned Chief Justice held that the statute, as thus construed, was invalid. He said in part:

> **Then it is said the fee in the Supreme Court is left to the discretion of that court, which can be trusted to do the fair thing as a chancellor often does, by dividing the costs on an equitable basis. But the difficulty with this view is that the construction which the Supreme Court has given the statute does not reserve to itself this power. It says that in such a statute the fee must be reasonable in that it is to be based on a consideration of the value of the attorney's service to the claimant and the amount of time and labor expended by him, bearing a fair proportion to the amount of the judgment recovered. These are the usual and proper elements in fixing compensation for a lawyer's service. In other words, the Supreme Court, if any amount over the tender is recovered by its judgment, must fix a fee compensating the attorneys for the claimant for their work on the appeal, however excessive the recovery below and however much reduced on the appeal, if more than the original tender. Thus what we have here is a requirement that the carrier shall pay the attorneys of the claimant full compensation for their labors in resisting its successful effort on appeal to reduce an unjust and excessive claim against it. This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment (citing case). While the present case does not involve any such penalties as were there imposed, we think the principle applies to the facts of this case. We hold that so much of the statute as imposed an attorney's fee upon carriers in this case in the Supreme Court was invalid.**

Messrs. Wymer Dressler, Thomas P. Little page and F. W. Sargent argued the case for plaintiff in error and Messrs. Garrard Glenn and Wm. B. Walsh for defendant in error.

Carriers—Interstate Commerce

Where a shipper, in order to get the benefit of a lower rate, ships to an intermediate point, and there reships to the intended destination by a local bill of lading, such shipment is essentially an interstate movement and the shipper must pay the interstate rate.

Baltimore & Ohio Southwestern R. R. Co. v. Settle, Adv. Ops. 24, Supt. Ct. Rep. 28.

The Baltimore & Ohio Southwestern Railroad maintained a freight station at Oakley and another at Madisonville, both within the city limits of Cincinnati. W. H. Settle & Co., a firm of lumber dealers, had their place of business at Madisonville. They had no place of business at Oakley. The interstate rate on lumber in carload lots from southern points to Oakley, plus the intrastate rate from Oakley to Madisonville, was less than the interstate rate from southern points to Madisonville. In order to get the benefit of the lower rate, Settle & Co. shipped their lumber from the South to Oakley, there took possession of it, but without reloading, shipped it, within a few days of its arrival, on local bills of lading to Madisonville.

The railroad company brought suit to recover the difference between the amounts actually received and the through rate to Madisonville, arguing that as the reshipment was made simply to get the benefit of the

lower rate, the through rate applied. It was admitted that there was an original and continuing intention on the part of the lumber company to reship the goods to Madisonville, but the federal District Court for Southern Ohio, Western Division, charged the jury that this fact did not convert the shipments into through shipments, if there was a good-faith delivery at Oakley. The shippers obtained a verdict and judgment thereon was affirmed by the Circuit Court of Appeals for the Sixth Circuit. On writ of error to the Supreme Court the judgment was reversed.

Mr. Justice Brandeis delivered the opinion of the Court. Referring to the shippers' contention that the character of a movement, as intrastate or interstate, depended solely upon the contract of transportation, and that as the lumber came to rest at Oakley, its reshipment to Madisonville by a new contract was an intrastate movement, he said:

> This contention gives to the transportation contract an effect greater than is consistent with the purposes of the Act to Regulate Commerce. The rights of shipper against carrier are determined by law through the provisions of the tariff which are embodied in the applicable published rate (citing cases). And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration (citing cases).

He said further:

> Madisonville was at all times the destination of the cars; Oakley was to be merely an intermediate stopping place; and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, or unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic.

The learned Justice appended a list of cases which showed the abandonment of the old distinction that while a carrier might not act as reconsigning agent for a shipper in order to enable him to use a combination of lower intermediate rates and thus avoid the higher charges incident to the through interstate movement, the shipper might so use the combination by reshipping his goods.

Mr. Justice McReynolds dissented but wrote no opinion.

Mr. Geo. Hoadley argued the case for plaintiff in error and Mr. HarryC. Barnes for defendant in error.

Insurance—Due Process

A state statute making hail insurance effectual from and after twenty-four hours from the time the application is taken by the agent, and requiring the company to reject applications by telegram, does not deny due proces of law.

National Union Fire Insurance Co. v. Wanberg, Advs. Ops. 62, Sup. Ct. Rep. 32.

This case involved the constitutional validity of the following North Dakota statute:

> Every insurance company engaged in the business of insuring against loss by hail in this state, shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and the hour the application for insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and in that event, the insurance shall not become effective. Provided that nothing in this article shall prevent the company from issuing a policy on such an application and putting the insurance in force prior to the expiration of said twenty-four hours.

At ten o'clock A. M. on July 12, 1917, Wanberg signed an application for hail insurance and delivered it to an agent of the defendant company, paying the required premium. This agent had authority only to solicit applications, and on the afternoon of the following day he mailed the application and premium to the office of the company, where it was not received until July 16th. On the 17th, the company sent the application and premium back to the agent and notified him that it would not accept the insurance. But on the evening of July 14th Wanberg's crops had been seriously damaged by a hail storm. Of this fact the company was ignorant. Wanberg sued the company, relying on the quoted statute, which the company contended deprived it of its liberty to contract and so violated the Fourteenth Amendment. Judgment for the plaintiff was affirmed by the Supreme Court of North Dakota, and on writ of error was again affirmed by the Supreme Court of the United State.

The CHIEF JUSTICE delivered the opinion of the Court. After citing cases which established the right of a state legislature to regulate insurance companies as engaged in a business affected with public interest, he said in part:

> We agree that this legislation approaches closely the limit of legislative power but not that it transcends it. The statute treats the business of hail insurance as affected with a public interest. In that country where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes, and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be be effective for the purpose. The danger and loss to be mitigated are possible for a short period. The storms are usually fitful and may cover a comparatively small territory at a time, so that of two neighbors, one may have a total loss and the other may escape altogether. The risk justifies a high rate of insurance. It differs so much in these and other respects from other insurance that it may properly call for special legislative treatment. The statutes apply to all companies engaged in such insurance. There is no discrimination and no denial of the equal protection of the laws.

He said further:

> This does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours. It is urged that no company, to be safe and to make business reasonably profitable, can afford to place more than a certain number of risks within a particular section or township and that what is called "mapping" must be done to prevent too many risks in one locality and to distribute them so that the company may not suffer too heavily from the same storm. Applications are often received by agents in different towns for the crops in the same section or township so that if local agents were given authority finally to accept applications, this "mapping," essential to the security of the company in doing the business at all, would be impossible. It seems to us that this is a difficulty easily overcome by appointing agents with larger territorial authority and sub-agents near them, or by the greater use of the telegraph or telephone in consulting the home office or more trusted local agencies. While the time allowed is short, we can not

say that it is unreasonable in view of the legitimate purpose of the legislation and the possibilities of modern business methods.

The learned Chief Justice pointed out that the fact that although the statute had been in force since 1913 it had not put hail insurance companies out of business, showed that they were able to adjust themselves to its requirements.

Messrs. Nathan H. Chase and Wm. H. Barnett argued the case for plaintiff in error and Messrs. W. B. Overson and William G. Owens for denfendant in error.

Interstate Commerce Commission—Mandamus

When the Interstate Commerce Commission has decided a case on its merits and denied relief in the exercise of its discretion, mandamus is not a proper means for obtaining judicial review.

Interstate Commerce Commission v. United States ex rel. Adv. Ops. 5, Sup. Ct. Rep. 6.

The Waste Merchants' Association of New York filed a complaint with the Interstate Commerce Commission alleging that defendant carriers had refused to load paper stock as required by the existing tariff, and asking an allowance for their failure to do so. The Commission filed a report of its findings, dismissed the complaint, and later denied a petition for rehearing. Then, on behalf of the Association members, a petition for writ of mandamus, asking that the Commission be directed to take jurisdiction of the claims and award damages, was filed in the Supreme Court of the District of Columbia. This court dismissed the petition, but that judgment was reversed by the Court of Appeals on the ground that upon the facts found complainants were entitled to relief. Upon writ of error to the Supreme Court the judgment of the Court of Appeals was reversed.

Mr. Justice Brandeis delivered the opinion of the Court. He said in part:

> We have no occasion to consider the merits of the controversy before the Commission. That it did not dismiss the complaint for lack of jurisdiction is clear. It heard the case fully. The Commission dismissed the complaint because it held that the petitioners were not entitled to relief . . .
>
> Petitioners sought in the proceeding to set aside the adverse decision of the Commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise of judgment or discretion, (citing cases) or be used as a writ of error . . . .

The learned Justice distinguished cases granting mandamus where the Commission had wrongly held that it did not have jurisdiction to adjudicate the controversy, or where the Commission wrongly refused to perform a specific, peremptory duty prescribed by Congress.

The case was argued by Mr. P. J. Farrell for the Interstate Commerce Commission and by Mr. P. H. Marshall for the Merchants Association.

Party Wall Statutes

The Pennsylvania statute giving a real property owner the right to build a party wall on the boundary line of his lot without liability to the adjoining owner for damages necessarily resulting therefrom, does not deny due process of law.

Jackman v. Rosenbaum Co., Adv. Ops. 7, Sup. Ct. Rep. 9.

Plaintiff owned a theatre in Pittsburgh, the wall of which went to the edge of his line. Defendant who owned adjoining land proceeded to erect a party wall, intending to incorporate plaintiff's wall. The latter, however, was declared unsafe by the city authorities, and defendant had it torn down. Plaintiff brought suit for damages resulting from loss of rental during the theatrical season, and obtained a verdict. But the Court of Common Pleas refused to rule that the Pennsylvania party wall statute, if interpreted to exclude the recovery of damages without proof of negligence, was contrary to the Fourteenth Amendment, held that the person employed to tear down the wall was an independent contractor and hence defendant was not liable for his negligence, and gave judgment for the defendant *non obstante veredicto.* This judgment was affirmed by the Supreme Court of Pennsylvania and, on writ of error, again by the Supreme Court of the United States.

Mr. Justice Holmes delivered the opinion of the Court. The Pennsylvania upper court had sustained the statute as an exercise of the police power. Referring to this, the learned Justice said:

> It is unnecessary to decide upon the adequacy of these grounds. It is enough to refer to the fact also brought out and relied upon in the opinion below, that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn and has prevailed in the State ever since. It is illustrated by statutes concerning Philadelphia going back to 1721; (citing statutes).
>
> The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey* v. *Morgan*, 256 U. S. 94, 104, 112. . . . Such words as "right" are a constant solicitation to fallacy. We say that a man has a right to the land that he has bought and that to subject a strip six inches or a foot wide to liability to use for a party wall therefore takes his right to that extent. It might be so and we might be driven to the economic and social considerations that we have mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.

The case was argued by Mr. H. F. Stambaugh for the plaintiff, and by Mr. A. Leo Weil for the defendant.

Real Estate Brokers' Licensing Act

A state statute creating a commission to license real estate brokers and authorizing the commission to require and procure proof as to the competency, etc., of the applicant, does not deny due process of law.

Bratton v. Chandler, Adv. Ops. 44, Sup. Ct. Rep. 43.

Chandler & Walden, a firm of real estate brokers, assailed the constitutionality of the 1921 Tennessee statute constituting a Commission to license real estate brokers, by instituting suit against the officials in charge of enforcing the Act. The District Court for the Western District of Tennesseee held that the following section violated the Fourteenth Amendment, and that as without this provision the purpose of the entire section would be destroyed, the entire act was invalid:

> The Commission is hereby authorized to require and procure any and all satisfactory proof as shall be deemed desirable in reference to the honesty, truthfulness, reputation and competency of any applicant for

(*Continued on Page 778*)

POLITICAL AND ECONOMIC REVIEW

Different Aspects of Compulsory Labor Treated in Current Periodicals—Curious Effect of Removal of Pressure for Surplus Production in Balkans—Single Tax, Production and Disposal of National Revenue—Articles Dealing with Question of "Fair" and "Living Wage"

IN an article, "What Ideals Do We Wish to Preserve?" in *The North American Review* for December, Mrs. Cornelia J. Cannon asserts that "equality of opportunity" is "the main justification for the creation of a democratic society" and that the citizen "will find that it is only when his liberty infringes that of another individual that the law purposes to interfere with him." In the sense in which a slave's liberty interferes with the "liberty" of his master, the second statement is true, but does not prove "equality of opportunity." If "the *equal* liberty of another individual" is meant, the statement is not true. The owner of commercially valuable property gets a much greater degree of "liberty" than does the propertyless man whose liberty to use that property is denied.

Even an institution like slavery, however, can be defended as a necessary evil in its time and place—necessary not to secure equality of opportunity, but to secure leisure to an unfortunately limited class, enabling that class to promote culture and progress. Such a defence is made of slavery (in the past) and of the existence of a servile class (in the present), by Alfred H. Loyd in the September *American Journal of Sociology* ("Ages of Leisure"). He foresees, however, the extension of that leisure to all, through the enslavement of "The Iron Man," the machine. Other writers are less optimistic about man's ability to enslave the machine, and fear that the reverse has taken place. In *The Yale Review* for October, Professor John M. Clark develops Samuel Butler's fantasy in "Erewhon" concerning the Frankenstein which we have created and which has turned about and enslaved us. Our only hope even for "racial equality" with the machines is by creating other machinery. "Economic machinery for bringing the collective human judgment and will to bear *at the point where things are decided, in the processes of industry itself,* rather than waiting till the decision is made by engineers and captains of finance, and then, through our 'political' machinery, taking belated and purely defensive action." In taking this article as a starting point for further development, Philip Cabot makes the interesting suggestion in the December *World's Work* ("Slavery and Steel—A Day Dream?"), that possibly slavery was not abolished in the Civil War, and that those who work twelve hours a day and seven days a week in the steel industry are in a very real sense "wage slaves"—slaves not to Judge Gary but to machines. But does the law not in fact still make some men slaves to definite owners? Not in specific terms, of course. Neither would a law sentencing a man to be thrown into the Niagara Rapids be sentencing him *in specific terms* to die. He might even escape death if circumstances or his own prowess as a swimmer favored him. If he should die, however, most of us would think it quibbling to deny that the law had sentenced him to die. The law denies the great majority of persons access to the means of a livelihood—those means being designated the "property" of others. In the majority of cases, however, the men forbidden this access can escape starvation without becoming completely subservient to any employer, by playing off one employer against another. In the majority of cases, but not in all. It not infrequently happens that workers who are cut off by the law from access to means of production are in such a position that the only way of escape from starvation is complete submission to some one employer—the only employer in the region. In such cases the law does indeed force them, under penalty of starvation, to work for that employer on his own terms. The legal mechanism which accomplishes this result differs from the legal mechanism of slavery. The result is the same. Whether it is avoidable is another question. Slavery is not necessarily the worst of all possible evils, as pointed out in Mr. Lloyd's article. Without some kind of compulsion to produce we might conceivably revert to barbarism, though the compulsion be tempered by a degree of counter-compulsion. There is danger of this reversion, thinks Dr. R. Estcourt, as a result of the after-war establishment of small peasant proprietorship in Eastern Europe. ("An Unexpected Consequence of the War," *The Annalist,* November 6). Before the War, each agriculturist produced enough to feed about five persons. Under peasant proprietorship, the peasants could doubtless grow richer by continuing to produce more. But that is not the force which motivates the Eastern peasant. His aim is to own land in order, not to grow rich, but to feed his own family without dependence on the markets. He will work only hard enough to produce this result. When the land was owned by a lord, he had to produce more, in order to pay the lord his economic rent. The lord then spent it "vicariously" in a manner which kept the city industries going. It was a kind of forced labor, essential for civilization. In Soviet Russia, the government attempts to apply the same force to the peasants directly by taxation, instead of indirectly through the agency of "revenue farmers" (land owners). For this reason the writer finds the situation in Russia more hopeful than in Central Europe and the Balkans, for in the latter, no pressure at all is applied to the peasants to produce the surplus. As long as the pressure is applied, it is immaterial, in the writer's opinion, which method is applied.

The single taxers, of course, do not share Dr. Estcourt's indifference to the method. In the first place, they would contend, the pressure under private ownership is insufficient to secure the maximum production. Many owners hold valuable land idle for speculative purposes. Like the Eastern European peasants, it is possible that they would make more money by utilizing the land during the period of waiting for the increment. George B. L. Arner thinks the profits from vacant land speculation to be greatly exaggerated. ("Costs and Increments in Vacant Urban Land," *The Annalist,* October 30; see also his investigation, "Land Values in New York City," in the August *Quarterly Journal of Economics*). He may be right. The fact

remains that many owners, like the aforementioned peasants, fail to conform to the classical specifications of the "economic man," and hold their land idle even when it would "pay" them to utilize it. The law not only fails to force them to utilize it; it forbids others to do so without their consent.

Even if all land were fully utilized, the single taxers contend that it makes a difference whether the economic rent goes to the state or to the private owners. If to the former, other taxes can be abolished; and if the economic rent exceeds these, the government can use the additional revenue for the public good. It can. But will it? Private owners will use part of their income for the public good too, in the form of philanthropies and investments, as the National City Bank so frequently points out. Will the government use a larger part for the public good, or will the additional public revenue all be wasted? Some evidence in support of the former probability is to be found in an article, "Increasing Activities and Increasing Costs," by Lent D. Upson, Director, Detroit Bureau of Governmental Research (*National Municipal Review*, October). This evidence is of course not conclusive; and if it were, it would not follow conclusively that the landowners should be made to surrender their revenue to the state. It merely throws light on one of the factors to be balanced in determining the justification of the income which the landowners are enabled to collect by virtue of law-given rights to coerce the non-owners.

The gross incomes of property-owners are obtained by coercion of the customers; their labor by coercion of the workers. The wages of the latter are obtained by counter-coercion of the employers. The liberty to withdraw or to withhold one's labor is valued not because one has an interest in not working at all (no such interest can be promoted in this way); it is valued because one has an interest in forcing better terms from the employer. This interest may conflict with more important interests of other people. If we say that any particular wage is in excess of a "fair wage," we are expressing a preference for the interests of some other classes over the interests which the particular workers have in the excess. Defining a "fair wage," then, is the process of balancing the various conflicting interests. What progress has been made in defining the "fair wage"?

The Railroad Labor Board has recently denied the men's plea for a "living wage" and has dismissed the whole "living wage" theory. The Board contends that to grant the minimum of 72 to 75 cents an hour "with corresponding differentials for other classes" would ruin the roads. "By what law of the Medes and Persians," *The New Republic* inquires (issue of November 15), "are the differentials for other classes required to correspond?" With less cogency it insists that an industry is parasitic if it does not provide its workers a living wage. In such cases it would seem to follow that the wage should be placed by law *above* that which the worker's coercive weapon alone would yield. "Parasitic" may be a matter of definition, but the smallness of a worker's wage is a result of the insufficiency of his weapon (power to withhold his labor) to oppose the coercive weapons of property owners; and the property-weapon of his particular employer is not the sole weapon which the worker has to oppose. Destruction of his particular employer as "parasitic" will not necessarily help the worker, even if he is practically that employer's slave. He may have been forced into slavery to escape the starvation into which the law, in the alternative, would force him by means of the property rights of food purveyors. If we ruin the employer, we may be depriving the worker of even this alternative to starvation. The "parasitic" argument for the living wage is inconclusive.

On the other hand, some of the arguments advanced against the "living wage" are equally inconclusive. For instance, Arthur Richmond Marsh (*The Economic World*, June 10) and Edward A. Bradford (*The Annalist*, September 18), divide the estimated total national income by the number of people to be supported, and conclude that if the railroad workers get what they ask, other classes will have to get very much less. This is the old "wages fund" doctrine expounded by John Stuart Mill and his predecessors, but subsequently repudiated by Mill himself and most subsequent economists. The fallacy is the same as that underlying communism. It ignores the fact that some incomes above the average serve as incentives to the production of more total wealth; hence the reduction of such incomes, while it would give the poorer classes a greater *proportion* of the total income than now, would in all probability give them smaller *absolute* amounts, because of the reduction of the total. Whether the living wage for the railroad workers, or any other man's income in excess of the average, functions as a stimulant to production, is a question of fact which Messrs. Marsh, Bradford and the communists fail to answer. Even if the establishment of the "living wage" would fail to increase the total production, and would consequently reduce the *average* income of other classes to less than now, it is not certain that it would reduce the *actual* incomes of those now in a poorer situation than the railroad men. Further study would be required to determine to what extent the advance would come from the pockets of middlemen, landowners and employers, to what extent from other laborers.

Meanwhile in a communication to *The Survey* (September 15), Professor Frank T. Carleton suggests briefly but very interestingly five principles which he thinks would make "a long step toward peaceful settlements of industrial disputes possible." Covering a wider field, Professor Walton H. Hamilton, in "A Theory of the Rate of Wages" (*Quarterly Journal of Economics* for August) makes a systematic and clear survey of the "economic factors amenable to control" (many of them legal factors amenable to control by changes in the law) by means of which "real wages" might be advanced without impairing other "real wages." He makes clear the limits and possible objections in each case. The article is one of the most significant studies yet made of the lines along which practical economic reform might proceed.

ROBERT L. HALE.

Columbia University.

Where Lawyers Are Forbidden

"The unique feature of the legal system of the British protectorate of Aden, Arabia, is the absolute prohibition of all lawyers to reside or practice in the city. This regulation is very strictly enforced, even to the point of deportation if necessary. This provision is a relic of the early days of Aden, when it was a small military post. The population is now 55,000, and Aden is the business center of the entire Red Sea district, but the requirement is still rigid."—Ex.

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THE KANSAS INDUSTRIAL COURT

A somewhat unusual situation has developed from the recent Kansas election. The legislature is said to be safely Republican in both houses but the Democratic candidate for governor was elected. He announces that he intends to devote himself to the repeal of the Industrial Court Act. Whether he will be able to accomplish this purpose is, of course, doubtful in view of the political complexion of the legislature.

Whatever one may think of the Kansas experiment, there is certainly ground for regret that present circumstances are likely to interfere with a fair test of the value of the court, under actual working conditions.

Kansas was regarded as a laboratory where questions of supreme importance were being put through the crucibles and weighed on the balances. It is to be regretted if the solution of these problems is made inconclusive because of political strife.

In a recent address before the Cleveland Bar Association, former Secretary of War Baker has called attention to one of the causes of the unwillingness of labor leaders to submit wage controversies to judicial determination. He attributes it to the lack of any fixed standard for the determination of wage rates, so that each separate judge before whom such a question might come would be a law unto himself. Coupled with this is the statement of Mr. Justice Brandeis in the Duplex Printing Press Co. case that labor is dissatisfied with the courts because, by virtue of their environment, the social and economic ideas of judges are considered to be prejudicial to equality between working man and employer.

The Kansas experiment held out promise of allaying these fears. Labor was beginning to find a method there, more expeditious and less costly than the strike, for the settlement of the controversies with the employer.

It is to be hoped that the Industrial Court will not be destroyed until it has been given a fair trial. If then it proves to be an unsatisfactory method for the administration of industrial justice, it will go to its grave unwept.

JOHN LOWELL

Only a short time before going to press we received word of the sudden death of Mr. John Lowell, associate editor of the Journal. It is difficult to express the profound sorrow with which Mr. Lowell's editorial associates received the news of his untimely decease. He had been indentified with the Journal from the time it began its career as a monthly publication up to the date of his death. He was a member of the Executive Committee which, nearly three years ago, adopted the plan for a monthly publication; he was promptly named one of its associate editors; and in spite of the demands of a busy professional life, he gave liberally of time, labor and counsel in the effort to make the Journal representative of what is best in the American bar. This issue bears witness to his ever-helping hand: the article on Attorney-General vs. Tufts was contributed by him only a few days before his death.

It is our intention in the next number of the Journal to have such a memorial as the character and the service of our lamented associate as a lawyer, a leading member of the American Bar Association, and as one of the board of editors of its official organ, seem to call for. Little more can be done here than to place on record this brief and heartfelt acknowledgment of the great value of his interest and co-operation, and of the deep sense of loss experienced by every member of the Board when he reflects that we shall no longer have the benefit of the wise counsel and the pleasure of contact with the charming personality of our friend who has passed away.

AN IMPORTANT MEETING

Holiday week this year will see the meeting in Chicago of the American Association of Law Schools, attended by several hundred accredited representatives of the great legal institutions of the country. Always a matter of interest to the profession, the meeting of this Association

has now become of even greater significance because of the greater importance which the American Bar Association, and enlightened members of the bar generally, have come to attach to the question of standards for admission to the bar. In the vastly important movement to improve those standards the American law schools constitute one of the most essential factors. It would profit little for the Association to propose a standard and gradually to secure its adoption in various states, unless there were provided the machinery for realizing the educational ideal. The law schools are this machinery; with the progress of ideas for the betterment of the profession the old false distinction between the academic and the practical has disappeared; they are seen to be one and the same thing by those who see the problem steadily and see it whole. The American Association of Law Schools, in particular, as an affiliated body, has long cooperated with the movement in the American Bar Association to raise the standards of the profession. It gave specific evidence of sympathy and community of aims when, in 1921, it abandoned its own plan for preparing a classification of law schools and heartily endorsed the action of the American Bar Association in imposing this task on the Council of Legal Education. And there can be no question that this spirit of sympathy and helpful co-operation will continue.

THE JOURNAL FOR 1922 AND 1923

The December issue of the American Bar Association Journal completes the publication of the second full volume since it was changed from a quarterly to a monthly. Its effort during the year 1922, as for the period before, has been to furnish a forum in which the bar could express itself as to legal problems and public questions of special interest to the profession. A glance over the eleven preceding issues for 1922 shows that a wide variety of subjects have been treated. Certainly most of the matters of grave and immediate importance to lawyers have received attention. The contributors have been judges, active members of the bar, professors in our great law schools, and distinguished men in other fields who had something to say to a profession whose admitted influence and responsibility extend far beyond the area of mere occupation.

The need for reform in the administration of Justice, and the methods whereby this may best be brought about, have been set forth in addresses by Chief Justice Taft and others. The great quest for legal means of settling industrial disputes between labor and capital, without a resort to the primitive method of trial by combat, has received the treatment which it deserves. Grave constitutional questions, arising from the unsettled humors of the time, have been touched on in addresses by former President Cordenio A. Severance and others. The important movement of the American Bar Association to help lift the standard of education in the profession to a proper level has been dealt with in various issues, and must continue to receive serious attention. The ethical impulse which lies at the heart of the Association's life, and which recently brought about the appointment of the committee to prepare canons of ethics for judges, has found due expression in comment and articles. As the official organ of a body to which nothing relating to the administration of Justice is alien, the Journal has presented from time to time informative articles on the Permanent Court of International Justice. Plans for promoting American citizenship and for improving the administration of Criminal Justice, have also found a deserved place in its pages. In addition, articles of especial practical interest to the practicing lawyer have been printed from time to time.

During this period, as before, the Journal has kept to its chosen and natural field, without attempting to trench upon that occupied by the more technical publications issued by or under the auspices of the law schools of our great institutions of learning. Its attitude has been that of helpful co-operation in a common cause. For 1923 the essential lines of policy as adopted and developed by experience will be adhered to; and the co-operation of the Bar in the work of giving the profession a national organ is earnestly desired.

CONTRIBUTIONS

The board of editors wish the members of the Association to feel that the JOURNAL is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention.

LORD SHAW'S IMPRESSIONS OF AMERICA

Distinguished Speaker at San Francisco Meeting of Association Writes Articles for London Times Telling of the Three Americas—New York Is Cosmopolitanism in Congestion, Chicago Has Vigor Without Fever, Pacific Coast Is a World of Exuberant Beauty

(*From the London Times*)

SAID one to me: "There are three Americas." "Yes," I replied, "and a no-man's land." We were canvassing those differences and contrasts between communities which naturally strike the mind of travelers from East to West across the vast breadth of the United States.

We were such travelers. We were, of course, well aware of at least two other well-distinguished and powerful sections—the America of the North-Eastern States and the America of the South, down through the Carolinas to Florida; but we were discussing what we were seeing.

New York is by itself. It represents cosmopolitanism in congestion. The skyscrapers which art, with a hesitating hand, is beginning to touch, here alleviating baldness of outline, and there throwing an occasional ornament of façade over a precipitous blank, signify much—the energy and daring that designed and constructed them, the enterprise and love of gain that demanded them just there and on these plots of ground, and that defiant heedlessness of the future by thus turning transport from ease and convenience into scuffle and deadlock. This future has come soon. Already, for instance, at the close of business hours, each of these reservoirs, twenty to fifty stories high, pours its living tide on to streets unable to contain the human avalanche, and standing room in any sort of transport can be reached only by a muscular triumph.

London's transport problem is hard and difficult; but it is child's play to this. What disarrangement is here! For this has happened in a land where there is so much of God's earth to spare.

Perhaps the time is at hand when the tenement village, at appointed hours, will assemble on the roof and take its flight from the city through the air! Unless this relief comes, the system is doomed—done to death by its own success. Or perhaps the scraper will go out of vogue when men begin to realize again that cities should be places to dwell in and not to dwell out of.

Whenever the congestion is escaped from the love of Nature and of art refreshingly shows itself, and that in two ways rare in domestic England. Housing has some real relation to architecture. The effort everywhere appears—to add the verandah, to give individuality to the home, and to avoid the slavish reproduction and in-building which stamp the ordinary British suburban street with sameness and make it lean towards squalor.

And the freedom of open-air life is accentuated by the entire absence of enclosures. The garden plots stand free to each other and to the road, and the passer-by walks, so to speak, among the roses and the flowering shrubs, while this form of trust in the people seems to have made a destructive theft and vandalism unknown. All over the United States this excellent un-Englishness appears; get but a little within the Canadian border, the fence and the exclusiveness again appear.

The congestion that thus spills over on to what may be termed the home States is of its democratic best; what remains is that *mélange* of population the absorption and civilization of which has been the glory of America.

We are not thinking of the richly living, beautifully and artistically housed New York, but of that other New York which appears to have drawn its population from all the nations under the sun.

It is the fashion to decry American political and municipal government; but with all its faults—and the very noting of them as faults loosens them at the root—it has, by the influences of constitution, education, religion, and law, kneaded and moulded and bound together what would *a priori* have been described as an untamable, unmixable mass, giving it cohesion, a general unity of ideals, and an upward direction. This is one of those fundamental virtues of America which make thoughtful men feel that if, forgetting herself, she could be induced to enter into those regions—say, Central Europe—where the future is black with racial antagonisms, she could help along at once, with power and with a priceless experience, the forces of harmony and healing on an international scale. We may hark back to this again.

Out of this agglomerate three races project themselves into public issues. These are the Jews, the Germans, and the Irish. Until now no public man could afford to treat them as negligible. But the time seems near when the separatism of these races in thought and purpose from their fellow-citizens will largely disappear.

There can be no doubt that anti-Semitism has been attempting to rear its head. As in England, a certain clever journalism seems to take to it. But the mass of men who can lead opinion do not, as I gather, treat it seriously. Among those who are led, race hatred is, of course, always easy to inflame; but there is no widespread, vivid interest about the topic.

Fear of the Jews has appeared in university circles, but has been easily out-argued. The best point in its support—its alleged association with Russian horrors—has faded away with the decline of Leninism. There is not stuff in it for a public issue. The grudge against the Jews, and this is greater in Canada than in the States, is that in countries where the clamant need is for industrial and agricultural labour, the favoured race—for reasons long drawn out in history—still take, not to production, but to distribution and finance.

The Germans form, for all public men, a more serious political problem. They are unquestionably in-

Note: Lord Shaw of Dunfermline Lord of Appeal in Ordinary in London, at the invitation of the American Bar Association, delivered an address at the recent San Francisco meeting. He spoke on "The Widening Range of Law" before the Association and also made addresses to the Judicial Section and at the annual banquet. The first and third of these have been printed in the Journal (Sept. and Nov. issues). The impressions of the distinguished visitor during his American stay cannot fail to interest his brethren of the law in this country; particularly as they are set down with the literary skill which made his "Letters to Isabel" so interesting and unusual.

dustrious in every walk of life; many have the capacity for leadership by reason of their thoroughness; but they are difficult to amalgamate on account of that dangerous cross patriotism which does not prize the citizenship to which they owe so much, because it takes it as qualified by a nationalism of origin which up to the Great War made no secret of its demands. Whether that stupendous event has changed this attitude remains to be seen. I honestly think that it must have done so; and I do not believe that the general trend of American opinion and policy in Europe, and towards a closer British *rapprochement*, would suffer deflection by or because of German-American influence.

The Irish are, in New York and similarly-situated Eastern States, a great and potent public force. Their numbers are large, they have a genius for organization and display, and they have taken to politics with fervour because here was a channel in which every anti-Britisher could clinch his cause with a reason.

But a change has occurred; I had almost said the impossible had taken place. The revelation of it came to me early on my visit—in the last week of July. Britain had granted self-government to Ireland; the useless shedding of blood seemed to have been stanched; the first beginnings of constructive rearrangement had appeared; capable Irishmen of affairs were leading their country. It was doubtful whether I should allude to the topic; there was the risk of unbecoming intrusion into what, in one aspect, was a delicate American situation.

I took advice, but the advices differed. When I broke ground, however, it at once appeared that it was already ground prepared, and that words of sympathy and hope and trust, spoken, not as an Irishman's boast, but as a Britisher's belief, met with an instant and uplifting response. Could it be possible that Englishmen and Americans were at last seeing eye to eye on Irish affairs? The powerful, sagacious, public-spirited men to whom I spoke were moved beyond words by the desire for the obliteration of the past, with its hatreds and its sorrows, for allowances for the new Government in its difficult task, and for good wishes, both for Ireland and for a really United Kingdom.

The truth shone out that these men saw themselves, and all of like mind, as actors in a new era, when their instincts for friendship with the old Motherland could no longer be thwarted by the call of Irish wrongs. I am no longer in public life; but I am not sure that since the grant of a Constitution to South Africa British statesmanship has ever reaped a swifter or richer reward.

Since that evening sad and tragic events have happened. Arthur Griffith has sickened and died; Michael Collins has bravely perished in an armed encounter. But the impression of America's attitude which was then formed has never been shaken. Moving across the continent, and hearing of one disaster and then another, I have done my best to gauge public opinion.

Tragedies, tragedies repeated, have not shaken America's sense of relief and satisfaction with British policy; they have moved many to genuine repulsion at civil strife, and some to doubts as to Irish capacity. But upon the whole this last feeling will be transient; with a happier turn in Ireland, it would disappear. That country has been lifted bodily out of the region of American politics; only one thing could ever restore that evil past—namely, a fresh interference by England in Irish affairs. Should that happen, however caused, who can tell the misery of it? Should that not happen, then one American public issue has vanished—the Irish question is dead.

The other two Americas and the no-man's land will be dealt with in another article.

II

The surprise of Chicago, as compared with New York, is that the sense of constriction of the latter gives place to a sense of expansiveness, and activity has vigour without fever. The second surprise is that separation in space, with elbow-room and plenty of it, has bred a sense of independence of all the other Americas, including everything east of the Alleghenies.

Here is something else than the New York and the Washington world. Whether or not it feels, with its head up against Lake Michigan, that it is part of the vast frame which has its feet planted at the Gulf of Mexico, anyhow the Middle West is the biggest, most real fact on the American Continent—an America self-contained, of enormous fertility and resources, and with a population second to none in energy.

When it is remembered that its area embraces the basins of the Missouri, Ohio, and Mississippi, what more need be said? Size, importance, strength, a continental leverage—all are here.

As you hear the converse of business and professional men, who are accustomed to take a wide survey of public affairs and of inter-State relations, the truth dawns upon you. And when you see the unending traffic of wealth and business and luxury along the Michigan Lake Shore Avenue you realize that here is a country to which Washington cannot be content with issuing a ukase; to the Middle West, Washington must render a reason.

Nor can the New York Press either interpret or control this very different and too distant community. Manchester and London may exchange views—but a few hours apart. But the one thousand miles of ground from New York to the nearest radiating centre of the Middle West make such connexion impossible. After the space has been surmounted a second America has been reached—an America of special needs, special interests, and special views.

The Constitution and the Flag—certainly the Middle West stands for those. The script of the one and the folds of the other are, happily, wide enough for all, and no trace of separatism appears—the Union has been sealed with blood. But in the region of policy, with all that variety of disposition, of situation, and of need, the task of the politician, especially when confronted with an international danger or an international duty, the duty of the statesman, must start with that stupendous first step, namely, that before America can speak with authority it must first attain unity of mind. Here is a problem worth thinking over.

Do not, however, let us come to any conclusion about it until we have reflected on a third America.

As the traveller passes from Kansas to the South-West, reaching towards the Pacific, with the help of the determination, the enterprise, and the administrative capacity of, say, the Santa Fé Railway, nothing avails to ward off that long-drawn depression of the spirit which the interminable mileage of desert produces. As you cross New Mexico and Arizona, death and the genius of desolation glare over the waste. An

Indian encampment, and the ruins of another, remind you that man lives, and disappears.

The absence even of bird life is pitiful. In a run of over a thousand miles I saw only one eagle and two turkey buzzards. Here and there, by keen watching of the arid ground, you may discern the scampering of the little prairie dog. Treeless, waterless, shadeless, alkaline waste. Query—will the research of the chemist ever avail to reduce these alkaline deposits to the service of man? Will Nature, in its most defiant and forbidding mood, ever be subdued in some gigantic scientific triumph? It seems for all eternity a No Man's Land.

The culmination of this sense of gloom might naturally have been found, one would say, in the Grand Canyon. But the great reality—described so often, but so far beyond all describers' power—so far outranged the former feeling by its impress of the strength of Nature's disruptive power and the littleness and transiency of man, that the United States and its problems were lost to sight in a blindness of awe and wonder. Then, suddenly, after a night crossing on the Sierra Nevada and the Coast Range, one woke up to a new world, a reaction in exuberance of verdure and of beauty—a third America.

It is well to enter California by Los Angeles. Much you may have read and heard and expected of San Francisco; but here, instead of what in one's ignorance one supposed to be merely one of earth's luxurious corners, you find a great, beautiful, powerful, and energetic city. Its centre already, alas! is climbing to the sky in the exuberance of its business energy; but it is laying itself out very spaciously in the sunshine over fields which, at a touch, seem to leap up in fruit and colour. This not in favoured patches, but anywhere and everywhere for a thousand miles along the Pacific shore, to the great ports of San Francisco and Seattle.

The point is—here are these States forming one community, self-contained, rich in resources, Oregon itself a bed of natural and mineral wealth; this is a third United States. But what has it to do with the other two?

Again the Constitution and the Flag—they count for much; but it is perfectly clear—and that is the thing worth thinking over—that real unity in interest, in needs, and in view can be attained only after not a little adjustment; and the statesman who, without that, would declare for the whole might divide his country. In my opinion, too little allowance was made for this class of consideration by the Allies, when streams of blood were being shed in the Great War, and America appeared to stand stolidly looking on.

After much reflection I think that in this substantial matter President Wilson was unjustly blamed. He had to unify his country. In this he may have adopted tactics whose indirectness chilled both those without and those within it; but on the main matter, no common American interest, bear in mind, being openly visible, he had to bring those three United States into line, to keep the Union solid. And this, it will be remembered, long after minor issues have vanished, he did.

I declare that I think a sacred unity in American opinion—very hard to achieve, very valuable to the world—may be nearer at hand than most people think. So far as opportunity went, I did my best to gauge opinion upon the lines of a European settlement, refraining, for obvious reasons, from introducing the question of America's position as a creditor. This is what I set down as the common denominator of leading, educated, public opinion as I measured it.

In the first place, on every issue as to the war, its policy, its outbreak, its methods upon all of them Germany's position was reckoned indefensible.

In the second place, all thinking Americans wish now that America had declared so sooner and more unmistakably—many citing the sinking of the Lusitania as an incident which, in less academic hands, could have solidified and energized the entire Union.

In the third place, they—if only the politicians would let them—would do much, almost everything, to blot out the past, and have others do the same. They do not hate the Germans; but there is much in European policy that simply does not mean business. Old grudges, on the other hand, mean stagnation and loss. Let there be an end.

In the fourth place, surely, after all that has happened, Europe, and France in particular, has the sense to see this. Now for a fresh start. Undeniably, the Americans wish to love and to deal gently with France, but the rebuff to their great bankers in Paris has made the feeling hard to sustain.

In the fifth place:—"Join in? Of course, America would join in. Do you think we are not big enough to do that? Just let us take our bearings, and you will see. Do you think when we look at the Old Country we do not know what gallantry means? We know that we are a bit heavy in the going. Give us time."

Yes: upon the whole, old rancours are fading away, new and sympathetic chords are being touched, fresh avenue to cooperative service are appearing, and this within the Anglo-Saxon race. And from that centre the hardened optimist may be allowed to hope that light and order may spread—God speed them!—over this poor, dark, distracted world.

Concerning Judicial Lynchings

"The mob has dictated this conviction. The bloodthirsty mob spirit permeated the atmosphere of the trial, and had its effect upon court and jury.

"Under the stress of this situation it would not have been surprising if the prisoner had pleaded guilty, thereby hoping to escape the threatening mob, and thus prolong his life. . . . The defendant may be guilty; that does not concern us. But he is entitled to a fair and impartial trial, to the calm, deliberate, and uninfluenced judgment of his peers. Orderly and constituted government demands such trial. It is a safeguard in which all members of society are interested, and which should be jealously upheld and guarded. A judicial lynching is a graver and more startling crime than a lynching by the irresponsible rabble. . . . Much of the success of any form of government depends upon the opinion of those governed, of its power to protect them in the administration of the laws, and in the wisdom and integrity of those who govern. When the courts do not uphold the laws, respect for law and for government ceases. . . . We are of the opinion that the prisoner has not had a fair trial, and that the lower court committed palpable error in not sustaining his motion for a new trial."—From opinion of West Virginia Supreme Court of Appeals in State v. Latimar, 111 S. E. Rep.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and in Neighboring Fields and to Brief Mention of the Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Among Recent Books

THE Life and Letters of Walter H. Page, by Burton J. Hendrick. Garden City: Doubleday, Page & Co., 1922. 2 Vols. 8 vo. pp. X, 436, VIII, 437.—The psychological biography is a matter of recent contrivance, and for this reason, perhaps, writers have so far confined themselves to individuals whose d[illegible]s in this life have rendered them peculiarly subject to [illegible]is type of analytical exposé. The few specimens we have seen of this newer type of biographical writing fill us with a poignant longing to see some of the chief figures in our recent resurgence of official idealism subjected to the probing eye of the analyst. There has been a great deal of critical writing about the psychology of the times, but no one has as yet displayed the temerity to attack the task of limning the chief protagonists of our latter day political philosophy in the light of these more general investigations. Unquestionably studies in contemporary psychology are interesting in the degree that they are illustrated by the lives of persons whose thoughts are themselves striking exemplifications of the tendencies of the times. The man with whom the present volumes are concerned seems to us to be an interesting subject for such a study. The compiler of his biography, Mr. Hendrick, however, with all the literalness of a Froissart serves us a singularly dull compendium of the events in Mr. Page's life, with little success in the problem of interpretation or analysis. Were it not for the inclusion of a considerable number of Mr. Page's letters into the two volumes, one would be inclined to pronounce his existence as having differed very little from that of the well-known "average men." These letters are the saving grace of the book. They breathe the spirit of a genial and cultivated gentleman, whose most characteristic mental reactions are the result of the traditions and limitations of the milieu of his birth.

It is strange and interesting that so many advocates of the democratic idea as it appears in its most recent garb of internationalism, should have come from those regions where for many generations the doctrine of state's rights flourished so vigorously. It is no doubt true that these ideas still lurk in the remoter reaches of the South, and for this reason it is in some ways incomprehensible that the internationalist philosophy expressed in the recent foreign policy of the Uniited States should have emerged from the miasmic haze of ante-bellum democracy. In one respect alone may we find a remnant of this ancient and, sad to say, discredited doctrine of state's rights. This is the principle of self determination. Thus while on the one hand the internationalism of our foreign policy corresponded generally with the excessive federalism developed in the same period, the idea of self-determination was in the broader sphere of international relations the last breathings of the state's rights doctrine that was so effectively laid at rest in our domestic affairs.

American diplomacy was established along nationalistic lines, when the idea of particularism was still fresh in our national life. It was in clear opposition to the European cosmopolitic ideas of the latter eighteenth century and to the legitimistic notions of the early nineteenth century. During this period our practice with regard to the recognition of new states and governments, and with regard to intervention was firmly established. It was due to the genius of Jefferson that the so-called *de facto* principle of recognition was discovered. This principle, to which we adhered until 1913, as applied to governments was simply that the *de facto* government of a state should be recognized as the responsible government of the purposes of international relations, irrespective of the way in which such power was obtained. After this view had been advanced by the United States, it was adopted by other nations and was fixed as established legal practice long before the twentieth century.

It is obvious that any attempt to use recognition as a political weapon, once it had been adopted as a legal doctrine, must savor somewhat of intervention. This is why the principle first announced by the United States was always regarded as a part of our policy of non-intervention. Hence to those familiar with our diplomatic history, the events following the accession of Huerta to power in Mexico are puzzling. The present volumes throw interesting light on the motivation of our policies.

Great Britain had given assurances that Huerta would not be recognized. These assurances were subsequently forgotten, and a person distasteful to the United States Government was sent to Mexico City as the British diplomatic representative. Mr. Page was instructed to make our attitude clear to the British government. The pronouncements of the President were reinforced by Mr. Page's own comments. He discoursed to Sir Edward Grey on the "moral" duty owed the Mexicans by the civilized world, and especially on the "obligations and inferences of democracy," which Sir Edward Grey seems not at once to have comprehended for, "at first he could not see the practical nature of so 'idealistic' a programme." (Letter to the President, November 16, 1913.) Later Mr. Page reports the following: (Sir Edward Grey speaking) "Suppose you have to intervene, what then?"

"Make 'em vote and live by their decisions."

"But suppose they will not so live?"

"We'll go in again and make 'em vote again."

"And keep this up two hundred years?" asked he.

"Yes," said I. "The United States will be here two hundred years and it can continue to shoot men for that little space till they learn to vote and rule themselves." This was an idiom that Sir Edward as a great exponent of imperialism must have understood.

Democracy at the point of the bayonet is intelligible even to the man bayonetted.

It would be unfair to Mr. Page to give the impression that this phase of the question was the one most emphasized by him. It was not; he emphasized the sense of "moral" obligation felt by the United States toward Mexico, and if Sir Edward Grey fancied he saw behind these phrases the ugly face of intervention, he may, in view of his training and traditions, be excused for his density.

One thing, the Mexican affair undoubtedly accomplished. This was to make clear to the British government that our government had acquired a new sense of moral values, which were leading us into paths hitherto untrodden. If, therefore, we were ready to abandon even our rigid policy of non-intervention for the sake of our new moral credo, it must undoubtedly follow that we would be most vulnerable to diplomatic approach from this direction.

The events which shortly followed seem to bear this out. From the point of view of diplomatic technique, it was unexampled skill for the British to adopt as the *motif* of their relations with us from that time on, the theme which Mr. Page had first rendered in the *affaire* Huerta. The response was in accordance with British expectations, and thenceforward the harmony between the two countries was sustained largely through the British skill in playing upon our governmental susceptibilities in the limbo of international morality.

It was not alone in respect to our time-honored policies of recognition and non-intervention that our interest in spreading the gospel of international right living—and thinking—led us away from the more stalwart nationalistic doctrines of an earlier age. The diplomatic correspondence with both Germany and Great Britain during the period of our neutrality in the great war testifies most amply to this fact. The results in respect to Germany need not be elaborated upon here. We mention the relations with Great Britain, because the volumes before us cast some new light upon the subject, and because the matter of neutral rights is still presumably of more than academic interest to the lawyer.

The suggestion has recently been advanced by an able text writer that we should abandon hereafter the classification of articles conditionally contraband. This suggestion, so destructive of neutral rights, seems to have been prompted by the fact that the British government by a series of Orders in Council re-inforced by the decisions of its prize courts practically frustrated the attempts of neutrals to trade with the opposing belligerents and thus effectually paralyzed neutral rights. Both during the American revolution and during the wars growing out of the French revolution, similar attempts were made. In all of these instances passionate defense of their rights was made by the neutral nations and in this way the untrammeled and brutal exercise of power by the various belligerents had been curtailed. But during the past war nothing of this sort happened, and as rights can exist only where they are vigorously defended, we cannot be surprised that text writers should be filled with a dull despair at the state of the law.

If we leave out of consideration the much debated questions of policy, we can discern in the discussions over neutral rights between the United States and Great Britain during the early period of the war how the new ideas of international morality restricted a free expression of the national right to trade in war time. Mr. Page's letters again sustain this point of view, as the following excerpts show:

> The President and the Government . . . in their insistence upon the moral quality of neutrality, missed the larger meaning of the war. . . The President started out with the idea that it was a war brought on by many obscure causes—economic and the like; and he thus missed its whole meaning. (I, p. 361.)
>
> This is not a war in the sense in which we have hitherto used that word. . . Precedents have gone to the scrap heap. We have a new measure for military and diplomatic action. Let us suppose that we press for a few rights to which the shippers have a theoretical claim. The American people gain nothing and the result is friction with this country; and that is what a very small minority of the agitators in the United States would like. (I, p. 371.)
>
> The present controversy seems here, where we are close to the struggle, academic. It seems to us a petty matter when it is compared with the grave danger we incur of shutting ourselves off from a position to be of some service to civilization and to the peace of mankind.
>
> In Washington you seem to be indulging in a more or less theoretical discussion. As we see the issue here, it is a matter of life and death for English-speaking civilization. It is not a happy time to raise controversies that can be avoided or postponed. We gain nothing, we lose every chance for useful cooperation for peace. In jeopardy also are our friendly relations with Great Britain in the sorest need and the greatest crisis in her history. I know that this is the correct view. I recommend most earnestly that we shall substantially accept the new Order in Council or acquiesce in it and reserve whatever rights we may have. (I, p. 372.)
>
> If we break with England—not on any case or act of violence to our shipping—but on a useless discussion, in advance, of general principles of conduct during the war—just for a discussion—we've needlessly thrown away our great chance to be of some service to this world gone mad. (I, p. 384.)
>
> I cannot begin to express my deep anxiety and even uneasiness about the relations of these two great governments and peoples. . . The friendship of the United States and Great Britain is all that now holds the world together. It is the greatest asset of civilization left. All the cargoes of copper and oil in the world are not worth as much to the world. Yet when a shipper's cargo is held up he does not think of civilization and of the future of mankind and of free government; he thinks only of his cargo and of the indignity that he imagines has been done him; and what is the American Government for if not to protect his rights? Of course he's right; but there must be somebody somewhere who sees things in their right proportion. The man with an injury rushes to the Department of State—quite properly. He is in a mood to bring England to book. Now comes the critical stage in the journey of his complaint. The State Department hurries it on to me—very properly; every man's right must be guarded and defended—a right to get his cargo to market, a right to get on a steamer at Queenstown, a right to have his censored telegram returned, any kind of a right, if he have a right. Then the Department, not wittingly, I know, but humanly, almost inevitably, in the great rush of overwork, sends his "demands" to me, catching much of his tone and apparently insisting on the removal of his grievance as a right, without knowing all the facts in the case. (II, p. 67.)

Two facts stand out in Mr. Page's letters during this period; one is his contempt for the lawyers who were feverishly seeking to maintain the rights of their clients, and the other is his impatience with the demands of the nearsighted traders for the recognition of their rights as neutrals to do business with all the belligerents in total disregard of the dangers through which civilization was treading. Without seeming to assume the role of a moral philosopher, one familiar with the history of international law cannot help reflecting that in the past humanity has been served by

the insistence of neutral shippers upon their rights to trade in the face of the destructive policies of belligerents; and but for these traders the civilization that lies so close to the hearts of all of us could not for very long endure. It was the failure to make good the assertion of neutral rights that led belligerents during the war to treat the neutral states with such profound contempt—conduct which has left upon international law the impress of the grisly hand of precedent from which in the future we may not so easily free ourselves.

Columbia University. JULIUS GOEBEL, JR.

II. Current Law Journals

IN reviewing the current legal literature, one is impressed with the large number of articles bearing directly upon some phase of the many questions which are constantly arising out of our industrial disputes. The questions discussed are varied, as is the point of view from which they are taken up. In an interesting and well studied article upon "Labor and the Law in the Public Utility Field," which appears in *Michigan Law Review* for November, George Jarvis Thompson, of the University of Pittsburgh School of Law, points out that the modern law of public utilities, though "commonly considered a new category of the Common Law," is in reality "simply the modern development and application of century-old principles that go back to the very roots of our common law system." And, while the task of "subjecting to public regulation and control the great corporate public service proprietors" has been pretty well accomplished, "there remains the decisive establishment of the reign of law and order over that of might and riot with reference to the powerful labor organizations in the public utility field." Although he finds ample support both in authority and principle for regulation of labor by the courts themselves, he agrees that "it would seem best, in an abundance of precaution, the situation permitting, that the courts, already laboring under the displeasure and suspicion of the working classes, avoid further odium by waiting until they can take this step under a legislative fiat, although, as will probably be the case, that is but declaratory of the common law." He then critically examines what is being done to meet the situation by legislation.

In an address dealing with "Labor Relations and the Law," in a more general way, Hon. Newton D. Baker, after giving a review of the "historical antecedents of present-day labor controversies," and "the attitude of the law in the past toward them," points out that "the courts are called in after the fight has started and are limited in their inquiries to the protection of life and property; which are mere incidents in the controversy. They have no machinery or jurisdiction to inquire into the causes or to redress the grievances out of which the conflicts have grown." However, in spite of the well-known unwillingness of labor to submit their disputes to the courts, he sees "some disposition on the part of unions themselves to adopt the courts as agents for the protection of their rights," and concludes: "I have no doubt whatever that some day all the labor relation questions about which we are now anxious will be fully settled and passed into the category of established rights to be administered by ordinary judicial processes, but the skirmish lines of the conflicting forces of progress will then be entrenched on opposite sides of a new No-Man's Land, the social and political forces of our people will be debating and deciding new sets of questions." It may be noted in passing that in Leveranz v. Home Brewing Co. et al., in the Ohio Court of Common Pleas, reported in *The Ohio Law Bulletin and Reporter* for November 20, 1922, we have a case of a labor union asking the aid of the court to enforce a labor contract. Mr. Baker's article appears in the November 13, 1922, issue of the same journal.

Other contributions to this field of discussion are: "Injunctions in Labor Controversies," by Walter Carrington, in *Virginia Law Register for October;* "The Kansas Industrial Court," by F. Dumont Smith, in *Central Law Journal* for November 17, 1922; "Arbitration in Trade Disputes," in *The Scottish Law Review* for October. The recent injunction procured by the Attorney-General in behalf of the United States against the Railway Employees is commented upon in *Central Law Journal*, November 17, 1922, and in the September issue of "The American Labor Legislation Review."

A protest against the fact that "there are now being dumped upon the national government many problems which could be handled more effectively by the state" is voiced by Attorney-General Daugherty in an address upon "The Co-operative Duties of the States and the Federal Government," delivered before the Illinois State Bar Association and published in the November issue of *University of Pennsylvania Law Review.* Another article of interest in the same journal is upon "Federal Power Over Intrastate Railroad Rates," by James M. Beck, Solicitor General of the United States.

The thoughtful attention of lawyers and judges is challenged by Sherman L. Whipple's article, "Problems Ahead of Courts and Lawyers," which appears in the October issue of *Canadian Law Times.* The article deals in the main with the criticisms that our courts are usurping authority by making law and by vetoing laws enacted by the legislature. He accepts, of course, both criticisms as being true, and as to the former concludes: "While, therefore, conceding that our system is not without defects, its merits far outweigh them. The Common Law, the 'judge-made law,' is too firmly fixed as the basis of our judicial system ever to be disturbed. It must continue to stand as the distinguishing feature of the administration of justice in English-speaking nations." As to the question, "Ought our courts to continue to annul the enactments of our legislature?" he admits that "the way out of the situation is not easy to see," and concludes that "for the present at least, we must look forward to the spirit which the courts have already shown as our safeguard in the exercise of legislative powers by the judiciary."

The proposed amendment to Article 5 of the Federal Constitution, which is designed to secure "a clear and unmistakable popular mandate" before any constitutional amendment can be adopted, is advocated by George Stewart Brown in an article in *Virginia Law Review* for November, headed "The New Bill of Rights Amendment." "The necessity for this proposal," says Mr. Brown, "is in part political and in

part legal. The political cause arises from the startling action by our 'legislative amending agents' in ratifying the 18th and 19th Amendments. The legal cause arises from the holdings by the Supreme Court in the cases growing out of the ratification of these two amendments."

Lawyers will find interest in reading an article by Arthur Stone Dewing in the initial number of *Harvard Business Review*, October, 1922. The article is entitled "Creditors' Committee Receiverships." Mr. Dewing traces the growth in popularity of these receiverships during the recent period of financial depression and compares their advantages and disadvantages with those of court receiverships.

Turning to discussions of more technical legal questions, there is an extended and analytical discussion of the meaning and function of "Cause, Legal Cause, and Proximate Cause," by Albert Levitt, the first part of which appears in *Michigan Law Review* for November.

"What are legal consequences as to the obligor of non-performance by the obligee of a condition of the obligation because of impossibility which arises after the formation of the contract?" Edwin W. Patterson, Columbia Law School, answers this question in so far as it relates to the law of insurance, in an article in *Columbia Law Review* for November. The article is headed "Supervening Impossibility of Performing Conditions in Insurance Policies," and classifies and discusses the decisions in a concise and clarifying manner. It is one of a series of articles upon the general question stated to appear in this journal. In the same issue of this *Review* appears an article by C. J. Foreman, head of the Department of Economics in the University of Cincinnati, upon "Conflicting Theories of Good Will," in which he develops that "improper analysis in discussing good will has burdened the law with more than a score of conflicting theories," very few if any of which approach the economist's point of view. A full discussion of the "dire consequences" this confusion has led to, which is without the scope of the present article, should prove most interesting.

The constitutional decisions of the Supreme Court during the last year are classified and reviewed by Thomas Reed Powell in an article headed "The Supreme Court's Adjudication of Constitutional Issues in 1921, 1922," which begins in the November issue of *Michigan Law Review*, and by Edward S. Corwin, Princeton University, in "Constitutional Law in 1921-1922," which appears in the November number of the *American Political Science Review*.

Under the title "Watered Stock and Blue Sky Legislation," H. S. Richards discusses the common law and equitable remedies available to the investor in cases where he is the victim of fraud practiced by a promoter or by the corporation. The article begins in *Wisconsin Law Review* for October. Current "blue sky" laws and the need for additional protective legislation are to be discussed in a future concluding article in the same journal.

Virginia Law Register for November contains an editorial commenting upon the Declaratory Judgment Act recently passed by the Virginia General Assembly, comparing the act passed with the act recommended by the Commissioners on Uniform Law.

ROBERT H. FREEMAN.

A Notable Family

"No family in America has produced more great men than that which stands at the head of this article (Randolph). In all departments of life and in all the activities of statesmanship, men of the Randolph family though bearing other names, have stood preëminent. To go into details would fill a library. Many books and histories have been written on Chief Justice Marshall, President Thomas Jefferson and General Robert E. Lee; and these are among the many celebrities of the House of Randolph.

"The founder of this family in America was Col. William Randolph, who was born in Yorkshire, England, in 1657 and died in 1711. Dr. Slaughter says: 'The Randolphs of Scotland were ennobled, and in England they played a conspicuous part in the diplomacy of Queen Elizabeth.' It is known that many eminent statesmen, including a Chancellor of the Exchequer, Lord Randolph Churchill, and Winston Churchill, at present one of England's great men, who did immense service to civilization in the World War at a critical time, were of the English branch of this family."—C. J. Ramage in *Virginia Law Register*, October, 1922.

BEHAVIORISTIC BASIS OF SCIENCE OF LAW

(*Continued from page 741*)

founded on the existence and purpose of a judicial tribunal.—The importance of emphasizing these two points consists in the fact that they provide the only strictly juridical refutation of the Hobbes-Austin definition of juridical law in terms of response to stimulus. We say "the only." Maine's attempted refutation by deriving law from custom is quite beside the point, since all custom, independently of judicial adoption, is an extra-juridical (sociological) fact, and cannot be adduced to refute a juridical theory. Equally irrelevant, and for the same reason, are: Ihering's attempted refutation in terms of "interest," Duguit's[11] in terms of "social need," T. H. Green's in terms of "social recognition",[12] and (need we mention it) any psychological attempt[13] to define law in terms of that extra-juridical entity "consciousness." These forces are all of them either political or sociological, or moral, or economic or mental, etc., and account for political, sociological, etc., laws, but not for juridical laws. There are non-physical controls of a strictly juridical character in abundance to disprove the physical force theory of law, without irrelevant appeals to outside aids. At the same time we cannot but defend the Austinians in so far as we believe that the physical force explanation must be considered superior to the above extraneous explanations, since it is at least a strictly juridical explanation in keeping with the behavioristic character of judicial practice.

(*Concluded in January, 1923, issue*)

11. See his *Law in the Modern State* (Transl. Laski.).

12. Compare Vinogradoff, *Common Sense in Law* (Home Univ. Lib.). Chap. II.

13. Such as that of Taine.

BRITISH-AMERICAN JOINT ARBITRATION BOARD

Account of How Over One Hundred Shipping Disputes Between Great Britain and the United States Were Satisfactorily Settled by a Tribunal of Which the General Public Has Heard Little

By Duncan Campbell Lee, LL. B.

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THE last twenty years have seen a large increase in the number of arbitration agreements between states. These have been almost uniformly successful in adjusting differences which without such procedure might easily have produced much international friction and bitterness or even led to actual strife. During the recent European and World War, however, there was developed a new arbitration procedure. It involved, not the solution of any large outstanding international problems, but the settling of a considerable number of what were really departmental matters, which had never heretofore been submitted to arbitration.

The "British American Joint Arbitration Board," formed to deal with collisions between ships of the British and American Governments, and salvage and other services rendered to those ships, constitutes this remarkable and interesting departure. To appreciate the difficulties which had to be met, and the amount of work which had to be done, a short outline of the position as it stood before the Board was formed, is necessary.

Before the United States declared war on Germany, the number of ships in European waters was comparatively small. Furthermore, the control of British shipping exercised by British governmental departments, though drastic, did not involve the transfer to the British Government of any large proportion of British tonnage. From 1917 onwards, however, in order more effectively to secure food supplies for the people of Great Britain, the British Ministry of Shipping increased very largely the number of ships under requisition. The result was that soon the Ministry of Shipping controlled an enormous fleet of merchant ships. Few of these were the actual property of the British Government, but they were requisitioned or chartered, upon such terms that so far as concerned the accidents of navigation and damage inflicted or sustained by a ship, the British Government was, to all intents and purposes, the owner.

In ordinary circumstances, if ship "A" collides with ship "B" and both are owned by private individuals, there is little difficulty of procedure. The owners of the ship have recourse to the courts to obtain compensation. But where a ship is owned by a government, or is so controlled by a government that responsibility for injury rests with that government, international comity precludes foreign private owners from presenting any effective claim in a court of law. By international usage, courts of law refuse to deal with claims made against foreign sovereign states.

So long as the British Government owned merely war-ships, no real difficulties arose. The accidents in which such war-ships were involved in collision, or were the subject of salvage assistance, were few and far between. But such cases as did arise were not permitted to embarrass the British Government merely because a suitable procedure was not at hand. They at once brought the case within the jurisdiction of the British Courts by adopting an interesting device. The Government furnished the name of the commanding officer of the war-ship in collision to the private individuals who considered themselves injured or aggrieved by the collision. These persons commenced an action against such commanding officer, the British Government conducting legal proceedings on behalf of the officer, and the government also paid, as a matter of bounty, whatever was adjudged to be due and payable by their servant. This procedure, though cumbersome, served to deal out justice between British Government ships and privately owned ships, whether British or not.

A procedure such as this, however, was valueless when ships of foreign governments were involved. Such disputes were generally settled through diplomatic channels. When large numbers of American warships began to operate in European waters and when, upon the commencement and increase of activities of the Emergency Fleet Corporation, many formerly privately owned ships were transferred to the ownership of the American Government, or came under its control, and also operated in European waters, the number of disputes arising out of collisions between ships owned and controlled respectively by the British and American Governments increased enormously.

This increase was due not only to the larger number of ships so owned and controlled, but also to the conditions of wartime navigation. Ships traversing areas in which traffic was frequent, were ordered to steam at night either entirely without the display of navigation lights, or with their navigation lights very much dimmed. They were instructed not to sound the ordinary manoeuvering signals as provided in the regulations. They were ordered to refrain from sounding signals for fog in submarine-infested areas. They had to assemble in convoy stations in bad weather, to manoeuver in convoy in difficult weather, and to manoeuver in convoy in fog. Ships sailing in convoy had to zigzag in convoy according to complicated and continually changing plans. For these reasons, the number of collisions rapidly increased; and the number of occasions when ships had to receive or render salvage services likewise increased, owing mainly to submarine activity.

The difficulties of the position were two, and they were real. First, there was no procedure apart from the cumbersome method of going through regular diplomatic channels, of dealing with questions arising between British and American ships owned and controlled by their respective governments; and secondly, there was no procedure available by which non-American private owners could obtain compensation in American courts for damage received from, or salvage services rendered to, American Government ships. And, furthermore, even in connection with ships not

under requisition or free of control by the Governments, the Governments were nevertheless interested. They had as a matter of policy undertaken war risks in connection with shipping under their flags, and they were consequently much concerned with the question as to whether, e.g. a collision between an American privately owned and controlled ship, was due to the negligent navigation of either ship or was the unavoidable accident arising solely out of navigation under war-time conditions. In the latter case, they would be responsible under the particular insurance scheme each country had adopted.

In November 1918, the difficulties of the position had become marked, and the scheme which ultimately developed into the "Joint International Arbitration Board" was mooted. Negotiations took place between the British Ministry of Shipping and the United States Naval Headquarters in London, and a method of solution was arrived at which satisfied everybody.

Much credit must be given to Commander McGrann, U. S. N. (Ret) and in an especial degree to Commander Robert K. Wright, U. S. N., R. F., for their able and tactful handling and carrying through of these negotiations to a successful issue.

The two Joint International Boards were formed; one to deal with collisions and salvages in, roughly, European waters; the other to deal with these matters in so-called American and Western waters. They were to sit in London and Washington respectively. So as to meet the possibility of the members of the Board not being unanimous in their judgment on any case, it was decided that the membership of each Board should be odd in number, so that a majority award would conclude the dispute. Both nautical and legal experience were required in the Tribunal. It was therefore decided that the London Board was to consist of two American and two British members, such members to be either sailors, or lawyers with Admiralty experience, and a fifth presiding member who was to be a member of the British Admiralty Bar of eminent juristic repute. Similarly the Washington Board was to consist of two American and two British members, and the presiding fifth member was to be an eminent American Admiralty jurist. Thus the devisers of this ingenious scheme overcame the difficulties of possible stalemate in the event of a tie resulting from the membership of either Board being even in number; and of possible suspicion or jealousy had there been only one board and had the majority of its members been either British or American. It should be noted that the possibility of having say a French, Dutch or Swiss member as the odd presiding member of any Board seems never to have presented itself to the minds of anyone concerned in the original negotiations.

The Board in London was constituted; the Board sat; the Board disposed of a large number of cases, and having regard to the way departmental business throughout the world is conducted, the Board disposed of its cases with remarkable and unheard-of despatch.

The Board at Washington was never constituted and never sat. Reports, however, of the decisions given by the Board in London were so favorably received at Washington that the Solicitor to the United States Navy Department on the 20th of September 1920, wrote to the secretary of the United States Navy as follows:

> It appearing that the cases that would properly come under the jurisdiction of the proposed Board to sit in Washington are limited in number, and it further appearing that actions taken by the Board sitting in London have been uniformly fair to this Government, it is believed that it is in the interests of all concerned that the power and authority of the Board now sitting in London be extended so as to give jurisdiction to hear and determine all cases over which the proposed Board to sit in Washington would have exercised jurisdiction had it been organized, namely, the causes that have occurred or may occur in American and Western waters, West of 33 degrees West Longitude, as provided in the agreement October 1st, 1919, covering the period of the war.

So the Board at Washington never came to birth, and the Board in London carried through the work designed for both Boards.

The greatest possible credit must be given to the British presiding member, Mr. Butler Aspinall, K. C. For years this Barrister has acted as Arbitrator in matters in litigation involving questions of navigation, arising between ships of all nationalities. Never has his urbane courtesy or strict fair-mindedness and impartiality been known to fail. Members of the Board have not been backward in speaking of the admirable way the whole arbitration was conducted, and the absence at all times of anything that suggested partisanship. Those who presented the cases for the respective governments expressed their keen appreciation of the way the various causes were received by the Board as a whole and in particular by Mr. Aspinall, who presided over all the meetings.

The American members were originally Commander Wright and Commander Jackson, U. S. N. Commander Wright, who was responsible for all the American departmental work in connection with these disputes remained on the Board throughout, but Commander Jackson attended only a few meetings and was replaced by Commander H. L. Pence, U. S. N., and subsequently by Commander W. R. Sexton, U. S. N. The two British members were Mr. Norman Raeburn, K. C., an experienced and brilliant Admiralty lawyer, and Captain W. Munroe Kerr, C. B. E., R. N. who attended several meetings but was later replaced by Captain A. B. Hughes, C. B., and ultimately by Captain J. N. Webster, C. B., R. N.

In most of the disputed cases there were unanimous judgments; but in a few cases, a majority award was necessary. The cases disposed of numbered over one hundred and involved possible damages aggregating several million dollars. It is satisfactory to note that so far as concerned a considerable number of the disputed cases, the Board decided that there had been no negligence on the part of anyone concerned, but that the casualties had been due to the unavoidable conditions of war-time navigation.

So great was the satisfaction given by the work of the Board, that it was decided to extend its jurisdiction to embrace cases in which only British and American war-ships were concerned. There had been a considerable number of collisions between such ships. These were, in the main, quickly settled by conference between Commander Wright of the United States, and a representative of the British Admiralty. The two would read through the government reports of the other side and in nearly every case came to an immediate decision that there was no negligence involved, or that one government or the other was clearly responsible.

The work of the Board has been completed; after setting off all damages, costs and expenses, and striking a balance, it was found that a sum of £10,000 was due and payable by the British Government to the United States Treasury; and that sum has been paid—

a negligible sum compared with the magnitude of the amounts in dispute.

Rarely in the history of international affairs has there been an arbitration so smoothly and expeditiously performed; never it is safe to say has there been any arbitral work that has given such satisfaction to all parties concerned.

It is believed that the British Government intend to confer honours on Mr. Aspinall and Mr. Raeburn as a mark of their appreciation of this work. It is also an open secret that many American citizens who have watched the course of this Joint Arbitration Board with the keenest satisfaction are anxious that their Government should intimate to the British Government the high appreciation in which these services have been held in the United States. It is perhaps unfortunate that the United States Government cannot in some exceptional cases confer honours upon non-American citizens.

The story of this arbitration is thus put on record that members of our National Bar Association may ask themselves: Should not the lawyers of the world take vigorous and prompt action to bring all international disputes under judicial influences similar to those that controlled in the "British-American Joint Arbitration Board?"

1, Brick Court, Middle Temple, E.C.4. Oct. 30, 1922.

THE CHINESE LEGAL SYSTEM

Reform Efforts to Reconcile the Practical Necessities of Chinese Traditions with the Principles of Modern Jurisprudence Have Generally Followed the Continental Idea, Though the Spirit of Anglo-American Law Is Not Entirely Absent

By LEONARD S. HSU

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BEFORE 1918 the Penal Law was the only written code of China and its history dated back to the time of the Chow dynasty. As one of the phases of the judicial reform in China during the closing years of the Manchu dynasty, new codes were drawn up.

In pursuance of the reform policy Prince Tsai Chen, Yuan Shih-Kai and Wu Ting-Fang were appointed Imperial Commissioners to compile a code of Commercial law, and in 1904 they submitted a draft containing nine articles of general law regarding merchants and 131 articles of company law. This code, based on the general principles of English company law, was shortly afterwards sanctioned by Imperial mandate.

In 1906 a Code of Civil and Criminal Procedure for the Chinese Empire was drafted. It distinguished between civil and criminal procedure, instituted trial by jury and provided for pleadings by lawyers in court. Another important feature was the introduction of the Anglo-American practice of cross-examining witnesses by counsel in preference to the well-known Continental inquisitorial procedure. Unfortunately this code was not adopted inasmuch as it was at that time felt to be too radical a change.

In 1906 a Bureau for the Revision of the Law was established. It prepared a number of important laws, such as the Bankruptcy Law, the Mining Law, the Police Offences Law, the Press Law, the Law of Associations, the Nationality Law and the Transportation Law. The Bureau also translated a large body of Western law, which was afterward published in thirty odd volumes. These formed the basis of those codes which were subsequently drafted by the Bureau: the Civil Code, the Criminal Code, the Code of Civil Procedure, the Code of Criminal Procedure and the Commercial Code. Japanese experts were associated with the Bureau, and the work became a semi-adaptation of Japanese law which, as is well known, is thoroughly permeated with German conceptions.

These drafts, however, were never officially promulgated until, with the advent of the Republic, some of the provisions were tentatively enforced by the new government. Since the Provisional Constitution provides that "no citizen may be arrested, imprisoned, tried or punished except by due process of law," the government decreed, three weeks later, that the draft Criminal Code should thenceforth apply in every criminal case.

In 1912 a new Law Codification Commission was formed to revise the Criminal Code, inasmuch as its text was in many places defective, and also to overhaul the several drafts prepared by the Imperial Commission but not yet promulgated. Later the Commission was reorganized and Dr. Wang Chung-Hui, a graduate of Yale, was appointed its chairman at the end of 1916. Subsequently the Commission's staff was enlarged, and many jurists of international reputation, such as Monsieur Georges Padeux and Mr. Tung Kang, were associated in the work.

In 1914 the first revised draft of the Provisional Criminal Code was approved, but as the reform under it was not sufficiently extensive, a second revision was undertaken. In February, 1920, the Commission completed its second revised draft, and translations in both English and French have since been published. This second revised draft is more logical and scientific than the original. Since some provisions are based upon the practice rather than the logical theories of the Chinese judges, they may be open to criticism by theorists. The chief source of this code is the Japanese Code of 1907. But a perusal of the draft would easily prove that a great deal has also been borrowed from the criminal legislation of the most advanced and recently published codes of European countries, as the Hungarian Criminal Code of May 28, 1878, the Dutch Criminal Code of March 3, 1881, the Italian Criminal Code of June 30, 1889, the Austrian Draft Criminal Code of 1893, the Soudan Criminal Code of 1889, the Swiss Draft Criminal Code of 1903, the Egyptian Criminal Code of February 14, 1904, and the Preliminary Revised Draft of the German Criminal Code of 1909. Of course, this draft is not final until it is sanctioned by Parliament. Nevertheless, there is good reason to suppose that, except perhaps for a few minor verbal changes it will become as at present published. This new code aims at making the criminal law as human as possible;

thus it is by no means any different from the modern standard. If a person is adjudged guilty, he will be decently punished. The utmost penalty is death. Other punishments involve imprisonment for life, or imprisonment for a period of not less than twenty years, with or without deprivation or suspension of civil rights or forfeiture of property. Corporal or physical punishment is carefully avoided except in case of capital offences. The severity of the penalties combined with leniency in their enforcement is no longer true. The recognition of the family as a unit in law and its responsibility for crime have been abandoned and are now only of interest to the students of Chinese history. Individual initiative is particularly emphasized. Corruption and other abuses are well guarded against by law.

Since the completion of the draft criminal code the commission has been engaged upon a new code of criminal procedure. Questions as to jurisdiction, arrest, detention, examination of accused persons, and attachment of property are being carefully considered. A summary procedure in petty cases and rules controlling frivolous appeals are also intended to be included in the code. Most importantly, the code of criminal procedure is being compiled with the highest regard for the constitutional rights and privileges of all citizens. It affords ample protection to accused persons as well as to witnesses. It will surely compare favorably with the legislation of the more progressive nations.

Simultaneously the commission is working on a new code of civil procedure. The two codes of procedure having been completed, the work of preparing a civil code and commercial law will finally be undertaken. In the meantime the old commercial law of 1904 was repealed in 1914 by two statutes: the General Law regarding Merchants and the Law of Business Associations. In the preparation of these statutes a great deal was borrowed both from English law and from Continental law. Other statutes now in force are: the Business Registration Law, the Law on the Registration of Business Associations, the Law on Chambers of Commerce, the Commercial Arbitration Law, and the Mining Law.

Before the Civil Code, the Code of Criminal Procedure, the Code of Civil Procedure and the Commercial Code are sanctioned by the Parliament and promulgated by the President of the Republic, the following are looked upon as having the validity of law: (1) laws promulgated by the Emperors during pre-Republican times and re-sanctioned by a Presidential order; (2) laws drafted but not yet passed by the Parliament, but promulgated by a Presidential order that such drafts be in force provisionally unless repudiated by the Parliament; (3) Executive orders; (4) regulations drawn by a superior institution for its subordinate offices or officers, and (5) executive and judicial instructions. There is, of course, a multitude of statutes, passed by the Parliament and sanctioned by the President, which is law itself.

Chinese legislation has shown a distinct tendency toward the Continental legal system. One or two attempts were made to follow Anglo-American principles, such as the commercial laws of 1904 and the draft code of 1906. As already stated, the first was repealed and the latter was not even adopted. The reasons for this are threefold. First, the large number of Chinese students trained in Japan naturally introduced into their country the Japanese system which is patterned after the German system based on Roman law. Thus German law was filtered into China through Japan. Second, Anglo-American law emphasizes the individual as against the family, while the Continental system inherits something of the old "familia." For centuries the unit of the Chinese society has been the family. Reform has been obliged to reconcile the practical necessities of the Chinese traditions with the principles of some modern jurisprudence. Naturally the Continental idea is easier to follow. Third, the prevalence of case law under the Anglo-American system is difficult, if not impossible, to be followed. It is easier to adopt a ready-made system of comprehensive rules clearly and concisely set forth section by section.

The spirit of Anglo-American law is not, however, entirely absent in China. There is a tendency in China to adapt both Continental and Anglo-American systems to her own conditions. Many Chinese students trained in English and American law have returned to their country. Many judges in the Supreme Court and in the lower courts have been educated in England or America. Their influence naturally leans to the common law system. Another evidence that China will combine both the Anglo-American and Continental systems is the development of the unwritten law of decisions and law interpretation and legal advice by the courts. In these respects the principles of both systems are easily kept distinct. There is a still more interesting instance of the revival of the Anglo-American system in China. The large semi-independent province of Hunan in central China, expressing allegiance neither to the Peking Government nor to the Southern Constitutional Government, has drawn up a Provincial Constitution of its own, looking toward the establishment of a federal form of government composed of all provinces. In its Constitution, the express authority to interpret the Constitution as against inferior statutes is granted to the courts. This supremacy of the judiciary in matters of constitutional law is but a faithful copy of the American practice.

There are two things which should be considered in drafting any code. First, the Chinese people have a civilization of their own which is distinct from that of all other peoples in the world. China may, therefore, utilize but not imitate Western systems as basis for the construction of her new codes. The ideals of both East and West should be preserved. Second, there is the great variety of Chinese customs. Some of these must be preserved in the new codes, while others must be sacrificed in favor of uniform legislation. Only thus can codification be successful, and the law be a controlling factor, and not merely be asserted on paper.

LEONARD S. HSU.

The Lawyer's Well-Defined Duty

"The lawyers have a well defined duty to perform. They will win and assure a sensible, speedy and economical administration of justice in America or they will surrender and lose further caste with a justly dissatisfied people who need them and who wish to respect them and follow them. The appeals, made at the San Francisco Bar Association Convention, ought to bestir every self-respecting, liberty-loving lawyer in America into a fresh determination to put this generation on record as understanding and desiring to follow the doctrines and wishes of the Founders of the great American Republic in protecting the Judicial Department from further trespass by the Legislative Department or from being actually 'absorbed in its vortex.'"
—Thomas W. Shelton in *Virginia Law Review*, Dec., 1922.

THE FUTURE OF THE CHILDREN'S COURT

In the Recognition of Such Tribunals as Courts of Justice Coming Very Close to Human Rights and Privileges, and Not Merely as Social Clinics, and in the Selection of an Experienced Judge Lies the Best Prospect for Successful Administration

By Hon. Solon L. Perrin
Judge of Superior and Juvenile Courts, Douglas Co., Wisconsin

THE idea of the family as the unit of civilized society is ages old. If there is a right inherent, it is the right to marry and rear children, to own a plot of ground and thereon to build a dwelling and in that dwelling to establish a home. That plot of ground may be up on the hill or down in the patch, depending usually, on the financial state of the owner. Fortunately, notwithstanding assertions of the radical to the contrary, there is no difference in the scheme of American government between the palace and the hovel. Each is sanctuary. Each is invested with strong lines of protection furnished by the common law, by Federal and State constitutions, by innumerable statutes and by that unwritten law not infrequently to be found behind the verdicts of juries when that sanctity has been invaded. The establishment of this great privilege is not due to a spontaneous growth. It has come down to us as the result of centuries of turmoil and the expenditure of lives and treasure beyond the power of comprehension.

It is not required before this assemblage to discuss for a moment even the urgent and ever-present necessity of protecting the inviolability and sanctity of the home. It is the very essence of civilized society, the foundation stone of human happiness and progress, the keeper of the people's morals, and its hearthstone is the cradle of liberty and the fountain source of an intelligent appreciation of a government by the will of the people as found enthroned in the law of the land.

The protection of the family in the home by virtue of the entrenchment thrown about it by the common law, our constitutions and our statutes must yield, however, to the demands of public necessity. In times of war the home may be invaded for military purposes, and in times of peace it may be opened for the purposes of search and seizure. The privacy and sanctity of the castle must yield to the requirements of the public, but it is to be noted always that these invasions must be according to the forms of law as found in the articles of war, in the statutes requiring strict compliance with legal procedure for search and seizure or for any other purpose whenever the fundamental right of the householder must yield to public requirements.

The interest which the public has, and must necessarily exhibit in the persons making up the great body of citizenry has led, in recent years, to another sort of invasion of the family circle through the establishment of judicial tribunals usually designated "children's courts" or "juvenile courts," under statutes enacted for the purpose of aiding in the protection and reformation of children. Whatever doubts may have existed as to the necessity for this legislation must be taken to have been wholly solved in its favor. Its necessity is too apparent to warrant discussion at this time. These statutes have come to stay, and they will be administered as a part of the law of the land in some form or other until such time as the people, in their wisdom, shall enact such laws governing the formation of contracts of marriage, as shall eliminate from the class of people permitted to form these contracts, all those persons found incapable, through mental disqualifications, of properly caring for the offspring resulting from that relation.

It seems to me the preparation of the mind, beginning in infancy, of a future citizen of the Republic is the most important business in which the American people are engaged. Fundamentally there must be inculcated in him a knowledge of his responsibility to constituted authority, beginning in the first instance with the Mosaic commandment, "Honor Thy Father and Thy Mother. This is the first precept. With this, and as a part of his infantile education, there should be impressed upon him a respect for the property rights of others, and the right to hold property inviolate and as a personal privilege, and herein another Mosaic found in the command, "Thou Shalt Not Steal." Again, the inviolability of the person. The fundamental of the ancient law is in that command which came down from the Mount for the protection of the home and the persons of the people that "Thou Shalt Not Commit Adultery," and supporting and upholding and surrounding these is that great underlying fundamental protection of the people's rights, found in another of the writings on the tablets which is "Thou Shalt Not Bear False Witness." These are the underlying and fundamental principles upon which we organize society. These are the things that the great body politic of the American people have a right to require of its citizens and on the teaching whereof in the home we have a right to insist. Failing in this, the home fails. Wanting this, there is created a great public necessity, which warrants the people, through judicial process, and judicial procedure alone, to enter the home for the purpose of correcting it in these things which are lacking in the essentials of good citizenship.

The world has made wonderful progress in recent years in the science of medicine, in hygiene, in sanitation and in many other ways. Thousands of earnest, able and capable men and women, some paid, and more as volunteers, are devoting their energies to the betterment of the human race. They recognize, as we all do, the great need for an education of thousands upon thousands of our fathers and mothers which will enable them to properly house and clothe, and feed young children. The enormity of the task does not discourage, nor does the obstinacy and stupidity of the parent, but with an eye single to the welfare of the child this great army, numbering among its forces the very best of our citizenry, is laboring day by day and year by

Note: A paper read before The American Humane Association at St. Paul, Minnesota, October 3, 1922, by Solon L. Perrin, of Superior, Judge of the Superior and Juvenile Courts of Douglas County, Wisconsin.

year to better the home conditions of the under-privileged child. The value of this work in the reformation and protection of the child will always be underestimated in the minds of the people. It is to a favored few only that the inestimable value of the labor of these great welfare organizations is known, and to that favored few only is known the ever-abiding necessity for this great work, and it is they only who know of the great necessity for more of these welfare workers.

I think there is no longer any question in the minds of those who have to do with the protection and reformation of children of the necessity of "children's courts," but it may be well to consider for a moment the meaning of the term and just what is understood by it. A typical illustration of such a tribunal is found in a statute which provides for the establishment of a court for the protection and reformation of children presided over by a judge appointed expressly for the purpose, or, what is better yet, as a branch of a court of general jurisdiction. Such a statute ought to provide for a clerk, a reporter, necessary probation officers and such paraphernalia as may be necessary, regard being had to the community to be served. No punishment should be permitted. The public should be excluded from all hearings, except in special cases where the presiding judge may otherwise order. Files and records of cases brought before the court should be preserved by the clerk and not open to the public, except upon order of the judge. No case should be brought before the court, except upon petition of a responsible citizen, duly verified. When it is considered that the parents and guardians of children brought before such a court are so frequently foreign-born, or, if native-born, are so poorly advised as to the operation of the law, as to be able to understand it only when they see it actually functioning, the hearing should be held with the judge on the bench, and with the clerk and reporter and the necessary probation officers and others present. Provision should be made for trial by jury if demanded, and for an appeal. Parents and guardians ought to be permitted to appear by attorney whenever they deem it advisable to be so represented. Power should be vested in the court to make such disposition of the child as its welfare requires, and to the extent, if necessary, of commitment to a reformatory. It should always be remembered that the child is not on trial. The hearing is for the benefit of the child and if any person or thing is on trial it is the parents or the environment, or both. The child himself is little more than testimony in the case. The hearing is to determine whether the parents can be induced to so correct their methods of child rearing as to give this child his particular chance, or whether the mental attitude of the parents or guardian is such that the interests of the state require dismemberment of the family relation.

Having in mind, as we always must, that this whole proceeding is an invasion of the right of the child to be reared in his own home, of the right of the parents to rear their own children, of the fundamental principle underlying the family unit in our whole social and governmental scheme, that these rights have been acquired by the human race after years of bloodshed, countless deaths and grief and sorrow, that the home is the family sanctuary and the house the family castle, it is not too much to say that the exercise of powers conferred by these statutes ought to be administered by judges, learned in the law, of broad experience, of a deep knowledge of human nature, and that skill in weighing testimony which comes after long practice either at the bar or in judicial life.

It has been a practice in the selection of judges among English-speaking people to choose from among the members of the legal profession not the younger members of the bar, but men of learning and experience. It has been considered, always, in the appointment of judges, and almost uniformly in their election, that the safeguarding of the people in their personal and property rights should be committed not to the unlearned or the inexperienced, but to those who have, in some measure, given evidence of the possession of what is commonly known as a judicial mind and temperament. Nothing occurs to me in the administration of the law, civil or criminal, legal or equitable, so important in its fundamentals as the administration of a statute by which the state, in its sovereign capacity, and for the benefit of its people, invades the home of the citizen and with the strong arm of the law takes out of it, a little child. Much is said of constitutional rights, of government by injunction, of the administration of the law by commissions, the death penalty as capital punishment, and the freedom of speech, but in no single instance is so much of human rights at stake as is involved when the law, in its majesty, reaches out with an all-powerful arm and removes a child from his mother's arms.

Another fundamental principle of the law is that the presiding judge shall always be disinterested and without prejudice, and entirely devoid of interest in the result of any matter or proceeding which shall be brought before him for his judicial determination. Whatever may be said, or whatever may be thought, or however little or much attention may be paid by people who think on these things, the fact remains that in every hearing there is a controversy, and that in every hearing there must be a finding of fact upon which a conclusion of law is to be based. In these children's courts this is as true as it is in any other judicial tribunal. Always there is the state on one side claiming that the welfare of the child requires the family dismemberment, and on the other side, whether voiced or not, is the cry of the parent calling to the law to maintain the sanctity of his home. If these courts are to be emasculated to the point of becoming social clinics, presided over by social workers representing the state, who, I ask you, will represent the home, who, the parent, and who is there to see his side of the child's welfare? Are the presiding judges of these courts to be both prosecutors and triers of fact, and is it to be left to them to pronounce the solemn judgment of the law in the cases they or their fellows present, or are these questions to be left, as they must be if these courts continue to exist as courts to an unprejudiced and disinterested judge? In the event of a jury trial, or in a trial before the court, or in a sharply contested and close case, on a question of fact requiring more than ordinary experience in the weighing of testimony, or in the charging of a jury, or in the admission of evidence, what do you expect the result to be if the children's courts are made mere creatures of associations organized for welfare purposes? I say that no matter how learned the layman may be, or how great his knowledge in scientific fields, and hygiene, and sanitation, and in all great questions of welfare, he falls far short in ability to protect the child and his home, through the medium of the legal and constitu-

tional guaranties behind which that child and that home are entrenched.

Let me not be misunderstood by my very splendid friends among the welfare workers. The man or woman trained to this purpose is doing magnificent work for the under-privileged, whether he be adult or child. The work of the untrained so-called social worker is frequently of doubtful value and sometimes positively harmful. It is my observation that the presiding judges of children's courts place implicit confidence in the trained worker and yield them their enthusiastic support. We must look to them to produce the great accomplishments along these lines of endeavor. The line I draw is between those cases wherein on account of degeneracy, ignorance and obstinate stupidity in the family, the welfare worker has not succeeded in accomplishing a reformation, and the protection of the state through the legal machinery provided for the purpose is called into action. If the welfare worker, for any reason, cannot succeed in bringing the child or the child's family, up to average conditions, and the state must do it, then the state should act through a court whose affairs are administered by some judge to whom has been committed, in a general way, the trial of causes of importance to the community in which he resides. Thus only can the confidence of the child, the parent and the public in the integrity of the tribunal be maintained.

No court nor system of courts can survive without the confidence of the people. No presiding judge can successfully administer the business of the court unless the people within his jurisdiction are possessed of a belief in his skill, ability, honesty and integrity. Tribunals for the administration of statutes enacted for the protection and reformation of children are judicial tribunals. They are courts organized for the administration of the law just as much as are courts for the trial of causes. As I have already suggested no more serious and solemn question can come before any court in the land than those which surround that class of unfortunates who are subject to the jurisdiction of these children's courts. As has been pointed out, the welfare worker is doing magnificent work in making better citizens of the under-privileged child, but it must be borne in mind at all times that the work of the children's court begins where the welfare worker's work ends. No child should be brought into court until the probation officers and other welfare workers have exhausted all means at their command to make unnecessary a judicial proceeding for the benefit of the child. It is one of the attributes of the presiding judge of a children's court to determine, in the first instance, whether the welfare worker and the probation officer have exhausted all means available to prevent the dismemberment of the family, and whether the judge himself can so impress upon the child and its parents the necessity for his reformation, and his protection by his own family to the end that the family unit may be maintained, that the intervention of the state may be rendered unnecessary. Often the judge is successful in holding the family together after the welfare worker has failed and has appealed to the court.

The title assigned to the writer of this paper by the President of this Association is "The Future of the Children's Court." That future, in my judgment, rests largely in the hands of the presiding judge. If that judge is a welfare worker, and only that, there is no future for the court. It will degenerate into a mere bureau, an adjunct of some association, having for its object one thing in one locality and another in another. Courts presided over by laymen have never been satisfactory though often used, but less at the present time than formerly. They are being gradually abandoned. The people do not believe in them. They illustrate the inadvisability of committing to the judgment of laymen serious questions arising in the administration of the laws. I have undertaken to point out, in a brief way, some of the problems presented to the judge of a children's court. It seems to me these courts lie closer to questions involving human rights and human privileges than any other courts in the land. I am firmly of the belief that the successful administration of these courts depends more upon the selection of the presiding judge than do any other of our judicial tribunals. I think a judge to be a judge of a children's court, should be a man who tries criminal cases, who presides in divorce cases, or who is equipped to do those things, who has a wide range of legal administration in the trial of civil cases, and he should be a man of broad experience in the practice of his profession. He should be the presiding judge of a court of record. He should be selected from among the judges of the courts of record in the community in which he resides, not with regard to his wishes in the premises, but entirely with regard to his ability to administer the affairs of that sort of a court. I do not say this has always been done, but it is what ought to be done, it is what the people are entitled to have, and it is what they should demand. The children's court is a great necessity, but to be effective it must be a court in all that the name implies. As I have stated before it should provide for jury trial, for representation by counsel, for an appeal to the court of last resort in the state. It should be presided over by a judge who is disinterested, who stands between the state and the child, and between the state and the parents. He should be able in cases of jury trials to know how to instruct the jury upon the law. He should be able to exclude from his consideration all extraneous matters, neighborhood gossip and hearsay evidence. He ought to be as wise as a serpent and harmless as a dove. With an assurance on the part of the people that these courts shall be so conducted, their affairs administered, their judgments tempered with God's mercy, with the ever-present remembrance of the teachings of that great commoner who commanded his disciples to suffer little children to come unto Him, these children's courts will become and remain most valuable tribunals in the upbringing of American citizens. With less than that they will become mere bureaus, lacking the confidence of the people, and of little, if any, value in the community. This work of bringing the under-privileged child to normal conditions, with the object and end of making of him a citizen, who shall be an asset instead of a liability, is the greatest work which the Supreme Being has delegated to the human race. It is in furtherance of this that our legislatures, in their wisdom, have created these tribunals, not for the exploitation of the unfortunate, but for their protection when necessary, and their reformation when possible. They must not be cheapened or their value lessened by the adoption of a mistaken idea that they are mere social clinics. When you begin to realize that these courts stand for the protection of the inherent rights of the home, for the preservation of the idea of the family unit, that they are not mere offices created to be administered otherwise than as judicial tribunals, you will have solved the question as to the future of the children's courts.

CURRENT LEGISLATION

It will be the purpose of this Department to bring to the attention of the bar the interesting changes in the fields of law which are being made by the legislatures. No person can be more alive to the possibilities of error, especially errors of omission, than the editors of the Department. The work of collecting the statutes for the past year has been performed under great difficulty, but it is hoped that it will be more successful with greater experience. The notes in the department will be simply a statement of the law as it appears in the statutes, with little or no attempt at its interpretation through a discussion of the cases. It is hoped that members of the bar will co-operate in calling the attention of the editors to omissions and mistakes and in supplying them with important new statutes in their states. Only by such co-operation can the department succeed.

The China Trade Act and the Narcotic Import and Export Act

AMERICAN business men in China have felt themselves handicapped in competition with foreign enterprises, British and French especially, by two considerations: (1) That American corporations engaged in business in China were liable to pay the American corporation taxes and (2) that Chinese citizens were unwilling to subscribe for stock in corporations organized in the states of the Union, so that it was difficult for Americans to associate Chinese capital with them in American corporate enterprises in that country. Corporations organized for Chinese trade under British and French law are exempt from British or French taxes and their charters are granted by governments well known to Chinese merchants.

Chinese capitalists know the United States of America and base confidence in its government. They would invest in a corporation organized under laws of and responsible to the United States, they were not so willing to take shares in an enterprise under the control of such unknown powers as the legislature of Delaware or Maine. Corporations of the territory of Alaska had been used in China, not because of any other advantage than that the laws under which they were formed were acts of Congress. It is, however, to the advantage of American business to have American corporations operating in China and to have Chinese citizens interested in those corporations, since an American corporation would naturally buy American goods and do as much of its business as possible in America and with Americans. The skill and knowledge of the country of their Chinese associates would increase greatly the probability of success of Americans doing business in that country, with its peculiar customs and needs.

To remove the handicap on American trade expansion in the Orient, the China Trade Act was passed and approved on September 19, 1922. The act authorizes the formation of corporations to engage, in China, in any business except banking and insurance. The tax exemptions are carefully guarded, and permit only the minimum necessary if the act was to have any practical value. They do not create a new class of tax-exempt securities for the benefit of individuals. That a complete exemption from all personal income tax on dividends from the corporations is granted to "citizens of China resident therein," does not practically affect this statement, since there would be no way of collecting the surtax from them. In any case this exemption was necessary if Chinese capital was to be attracted. The stockholders do not even get the benefit of freedom from the normal tax on their dividends, which is given for dividends of other domestic corporations. To prevent taking advantage of exemptions by purely legal stock ownership, the bill defines stock owners to be those entitled equitably to the dividends.

The corporations are freed from the Federal income tax, on income derived from sources in China, but only in the proportion which the amount of stock owned by Americans or Chinese resident in China, bears to the total stock, and this class of investors, those whom Congress intended to favor, benefit by the requirement that the amount of the exemption must be distributed to them as a special dividend. So the practical effect is that the corporations must set aside a sum equal to the tax and pay to the government that part which is not exempt, the rest to the stockholders of the favored class. If it gains an income from sources outside China, it must pay the tax on that income. A credit of income or excess profits taxes paid foreign governments is not permitted against the tax which the corporation is assessed, a privilege allowed other domestic corporations.

Congress finally decided not to create these corporations under its power over interstate and foreign commerce, since it was intended they might do any kind of business in China, operate a hotel, for instance, or a department store, but enacted the statute under the power to legislate for the District of Columbia. The corporations, therefore, will be District of Columbia corporations, but to make it evident that they are creatures of the United States the act provides that the name of the corporation "shall end with the legend 'Federal Inc. U. S. A.'" To further convince intending Chinese investors of the nationality of the corporation, their certificates of incorporation are issued by the Secretary of Commerce, who is authorized to issue them only if he finds that the corporation will aid in developing markets in China "for goods produced in the United States."

To assure American control the majority of the directors and the officers holding the office of President, Treasurer or Secretary must be citizens of the United States, resident in China. Supervision over the corporations is vested in an officer of the Department of Commerce termed the China Trade Act Registrar and he is given wide powers of investigation into the affairs of the corporation and may institute proceedings in the United States court for China for the revocation of the certificate of any corporation which conducts its affairs contrary to any law or

treaty of the United States or its articles of incorporation or by-laws.

In view of the discussion over the question of capital stock without par value, it is worth noting that these corporations can only issue shares with a par value, and each share must be paid for before it is issued either in cash or property at its market value as certified by the Secretary of Commerce or the registrar. To guard against one form of deception which might arise from par value stock, any statement or advertisement containing the authorized capital, must also give the amount actually paid in.

Our trade with China has increased from 6% of that country's total foreign commerce, where it stood before the war, to 17%, and with the aid of this new weapon American business men may hope not only to hold their own, but to increase their share.[1]

Another important act also concerned with the foreign trade of the United States is the Narcotic Drugs Import and Export Act, the Miller-Jones Act, approved May 26, 1922. The act was an amendment of the Act of February 9, 1909, with the purpose of limiting stringently both import and export of opium and coca leaves and their derivatives. The act expressly prohibits the bringing of any narcotic drug into the United States except that amount of crude opium and coca leaves found necessary "to provide for medical and legitimate uses only" by a board composed of the Secretaries of State, the Treasury and Commerce. Export is permitted only to countries which have ratified the International Opium Convention of 1912 and then only to persons authorized by the government of that country to import the drugs, on proof that the drug "is to be applied exclusively to medical and legitimate uses within the country to which exported" and that it shall not be re-exported and furthermore that there is a need for the drug in the country. Once the crude material is brought into the country, the Harrison Act regulating the domestic opium trade under the tax power takes control of it and requires an account of all narcotics manufactured and shipped. So under an effective administration of the new law and of the Harrison Act narcotics used in the country should be under strict supervision and should be accounted for to the Federal authorities. The Board will find it necessary to use great judgment in fixing the amount of crude opium and coca leaves to be imported and in apportioning the supply among manufacturers.

The export provisions carry out the duties of the United States under the Opium Convention to prevent the shipment of narcotics to foreign countries except under the regulations in force in those countries. The prohibition of shipment to a country for re-export was especially intended to cut short the growing trade in narcotics between the United States and China by way of Japan. The drugs were being sent to Japanese ports and there transshipped for the coast of China, whence they entered the Chinese market. Thus, in fact American manufacturers became parties, though often unwittingly, to the illegal drug trade in China.

Penalties under the act are very severe and the usual rule of presumption of innocence is changed by the provision that in a trial for bringing drugs illegally into the country, possession is deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

J. P. CHAMBERLAIN.

(1) China Trade Act, 1922, with regulations and forms. Trade Information Bulletin No. 78, Bureau of Foreign and Domestic Commerce.

Statute Law and Law Schools

"From the standpoint of the needs of its students, the American law school must give more attention to statutes. Much may be accomplished by an independent course on the subject; but all courses in the law school should at the same time devote some attention to the statutory basis of the law. Statute law is subject to criticism and should be criticized, but it should not be ignored by the law school. Competent criticism of and emphasis on statutes by law school teachers would aid materially in improving the body of statute law. At the same time it would send forth more effectively trained lawyers; and set in motion forces for statutory improvement in future generations."—W. F. Dodd in *N. C. Law Review*, June.

SOME AMERICAN CAUSES CELEBRES

(*Continued from Page 746*)

for the *capias* believed that he would be able to find her. In the refusal to issue this *capias* the Supreme Judicial Court found that Tufts had neglected his duty.

One Louis Bennett, confined in the Cambridge House of Correction early in 1921 made charges in substance that two brothers, named Corcoran, one employed in the House of Correction and the other in the Middlesex County Courthouse, had proposed to him to pay $1,000 to one or the other of them that he might be released on parole before Thanksgiving of 1920 and that that sum had been so paid and afterwards returned. That Tufts, with others, was implicated in the charges, although not in the receipt of the money. Bennett, then confined, was the only one of the material witnesses called by Tufts. Tufts conducted the hearing and testified himself before the grand jury, although he knew from the outset that, according to the charges made by Bennett, he was implicated in grossly willful conduct.

The last case I shall refer to is the Stearns case, so-called. In this case, Tufts was found guilty (as charged in the information) of a conspiracy with certain persons to secure the commission of a crime by Mr. Stearns in order that Mrs. Stearns could obtain a divorce from him.

The evidence in many other cases was presented to the Court, the trial lasting for more than twenty-four days; full and exhaustive arguments were presented by Counsel and, after very careful consideration of the evidence presented in all the cases, the Supreme Judicial Court in Attorney-General v. Tufts, 239, Mass. 539, made an order, the conclusion of which is as follows: "That the said Nathan A. Tufts do not in any manner concern himself further about the holding of or exercising the said office of district attorney for the Northern District, and that he be and is hereby removed therefrom and forejudged and excluded from holding or exercising the said office."

The Fathers established a government of checks and balances, but there is a growing tendency to make it one of cheques and deficits.

"The first requirements of the great lawyer are a good working conscience and a strong personality."—Albert S. Osborn.

CIRCUIT RIDING A FORMER NATIONAL ASSET

The Frequent Gatherings and Discussions of the Bar and the Sympathy and Close Contact Established Between People and Judicial Establishment Were Real Benefits for Which Some Adequate Substitutes Should Be Provided

By Henry C. Clark
Of the Jacksonville, Fla., Bar

IS there anyone acquainted with circuit riding who, in looking back over the old associations, does not experience a glow of intellect and a warmth of heart?

This is true whether reference be made to the ecclesiastical or the judicial circuit. A few books have been written to describe the manifold experiences, pleasant, difficult, tender, forbidding, joyous, sad, hallowed, of the pioneer clergy traveling their circuit. No book has yet been written devoted to a portrayal of the life, manners, hardships and benefits attendant upon judicial circuit riding.

The traveling of the court over its circuit is a far more ancient and deep-rooted institution than the riding of the circuit by a preacher, and is the subject of this discussion.

Circuit riding may be said to have been established by the freemen of England in 1215, when they forced King John's assent to Magna Charta. Among the provisions of the great charter, the king agreed that:

> We, or (if we shall be out of the realm) our chief justiciary, shall send two justiciaries through every county four times a year, who, with the four knights chosen out of every shire by the people, shall hold the said assizes in the county, on the day and at the place appointed.

A well-known student of legal history has said of Magna Charta:

> The most interesting part of this famous charter, as viewed by a modern reader, are the provisions for a better and more regular administration of justice. The effects of those are seen even in the present shape of our judicial policy, to the formation of which they contributed very considerably.[1]

It would be impossible to portray in detail the permeating and controlling influence upon the growth and development of English law resulting from the establishment of circuit riding so long ago. Not only the judge and court officers but the bar, too, rode the circuit. By way of illustration, consider what close personal contact these judges and lawyers had with the practices, customs, perils and mishaps met with by travelers, respecting both the means and manner of transportation, and the accommodations, comforts and security, or lack thereof, afforded by the inns or hostelries. Could such experiences, continuing year after year, verily, century after century, do other than exercise a deep-rooted influence upon the principles of the law of carriers and innkeepers as they were gradually evolved by these lawyers and judges? May not this account for the early declaration by the courts that common carriers and innkeepers exercise a public calling, that their businesses are impressed with a public interest, and hence are subject to governmental regulation? May not this be the reason why the businesses of common carriers and innkeepers were the first of all businesses to be pronounced by the courts to be impressed with a public interest?

A modern English judge a few years ago delivered an address upon "My Recollections of the Circuit." During the course of this address he said:

> The circuit, to speak generally, is an institution of the county, and surely a most useful one. I speak not now in regard of its primary object, the cheaper and more expeditious administration of justice, but of its effect indirectly on the law—on lawyers and on judges. . . . It is surely something that both judges and barristers should periodically leave their books, and the courts of London—should mix familiarly with other men—see other habits—learn the reality of life—its sorrows—its conflicts—face the nature of man, sometimes under its basest and most hideous aspect, but not seldom, believe me, presented in attractive colours, and with an heroic impress on it. Thus it can scarcely be but that their own minds are enlarged—their reasoning powers strengthened—and they themselves acquire a truer wisdom than they could learn from the mere study of treatises or arguments on points of law in Westminster Hall. Nor can the periodical visits of such a body as the judges and the bar be of no effect on the counties through which they pass. These visits work wholesomely upon all classes of the population. It is not merely that even the uneducated see justice administered and the law vindicated in criminal cases in a way which they understand, which interests them very deeply, and by which they are solemnly impressed. Who that is familiar with a county assize can doubt of this? Let anyone mix with the crowd and listen to the remarks which a trial elicits, with the sensible though unlearned criticism on the conduct of the judge and counsel, and he will see that these exhibitions, often noble and solemn, and sometimes, it may be feared, the mournful betrayal of infirmity of temper, or want of feeling, have their wholesome effect. . . . But not only the uneducated, the educated classes in their intercourse with the judges and the bar find themselves thrown into the society of perhaps the most startling intellect—greater variety of acquirements—and with prejudices at least different from their own. And the result is that their own intellects are stirred, and they are led to more active inquiry, and form perhaps larger views on whatever may be the questions of the day.[2]

When the colonists settled in America, courts were established in the new communities as conservators of the peace. These courts were modelled after those in England. The system of courts in New England differed slightly from that established in the south, and as the western county was opened other changes of detail appeared. But the institution of circuit riding was everywhere a part of the system. Here is a picture of Virginia Circuits:

> The riding of the Circuit, which always brought several into company, and the adventures of the wayside, gave to the Bar a sportive and light-hearted love of association which greatly fostered the opportunity and the inclination for convivial pleasure. A day spent upon the road on horseback, the customary visits made to friends upon the way, the jest and the song, the unchecked vivacity inspired by this grouping together of kindred spirits—all had their share in imparting brotherhood. Then the

1. Reeves: History of English Law, Finlason's Edition, Vol. II, page 30.

2. My Recollections of the Circuit, by Sir John Taylor Coleridge, a Judge of the Court of Queen's Bench. An Address at Exeter, England, 1883.

contests of the Bar which followed in the forum, the occasions they afforded for the display of wit and eloquence, and the congratulations of friends were so many additional provocatives to that indulgence which found free scope, when evening brought all together under one roof, to rehearse their pleasant adventures and to set flowing the currents of mirth and good humor, "to make a night of it," as the phrase goes. The Bar yet retains some of these characteristics; but the present generation (1849) may but feebly conceive the pervading and careless joyousness with which in that early time the members of their mirthful craft pursued their business thorough a countryside. . . . The present generation will bear witness to many an ancient green room joke of the circuit.[3]

Virginia court-days are famous:

For seventy years or more before the Declaration of Independence the matters of general public concern, about which speeches were made on Virginia court-days, were very similar to those that were discussed in Massachusetts town meetings when representatives were to be chosen for the legislature.

Even though Virginia had not the town meeting, it had its familiar court-day; which was a holiday for all the countryside, especially in the fall and spring. From all directions came in the people on horseback, in wagons, and afoot. On the court-house green assembled, in indiscriminate confusion, people of all classes,—the hunter from the backwoods, the owner of a few acres, the grand proprietor, and the grinning, heedless negro. Old debts were settled, and new ones made; there were auctions, transfers of property, and, if election times were near, stump speaking.[4]

In Tennessee it is recorded:

The center of county government in this State is of course the county court or the court of pleas and quarter sessions. This is but an adaptation of the English quarter sessions court, which in turn was derived from the old court leet and manor courts. The court leet is the lineal ancestor of the New England town-meeting.[5]

Circuit riding in Tennessee has been portrayed:

In early times, and indeed down to the present generation (1898) lawyers rode the circuits. No one county afforded a supporting practice to a bar richly supplied with able men, engaged in strenuous but legitimate competition. And so each lawyer had his saddle-horse, always one of the best, and followed the Judge from court to court. The life was healthful and the association of the lawyers created a feeling of fellowship such as is not fostered by present conditions. The heated discussions of the bar frequently begat asperities. Under any conditions it is not easy for lawyers to cherish enmity against each other, but especially was it difficult when they rode the circuit. The long rides together, and association at the village inn, favored a close and friendly intercourse, and speedily effaced all recollections of blows given and received in court. In the good old days, fees were not large, and as money was a scarce commodity, payment was often made in produce and live stock. It was not uncommon for lawyers to carry branding irons to mark the cattle they received for fees. Time was a most important element of all contracts, especially with lawyers.[6]

In the Ohio Circuits the horse and saddle were also conspicuous:

It was the custom to follow the courts in their terms, for the several counties of their circuit; so that, substantially, the same Bar would be in attendance, at courts distant from others fifty to one hundred miles. We travelled on horseback, over very bad roads, sometimes mid-leg deep of mud, or underlaid with the traditional corduroy bridge. Our personal riding gear, the saddlebags stuffed with a few changes of lighter apparel, often our law books; our legs protected by "spatter-dashes," more commonly called "leggins," and our whole persons covered with a camlet, or Scotch plaid cloak; we were prepared to meet whatever weather befell us.[7]

The influence of the bar in the early days of Illinois was most important:

Before the introduction of railroads, telegraphs, telephones, and the "daily newspaper," which collects the history of events in all parts of the civilized world, and, by means of the railroads, is delivered on the day of its publication at nearly every post office in the state,—the lawyers were the instructors of the people on every political topic.

The term of the courts usually lasted three or four days and rarely more than a week. On the Monday beginning the term, at noon or in the evening after court adjourned, some recognized member of the bar would "make a speech," defending his own party or assailing the other party. If the first "speech" was made at noon or at night, some lawyer would answer the speaker at night or at noon, and so the party orators would alternate to the end of the term of court.[8]

A variation, at least in the mode of conveyance, is found in the following description of a term of court in Hancock County, Maine:

During the session of the courts there, the shore and harbor exhibited the appearance of an Indian encampment. The judge and jurors, the parties and witnesses, the lawyers, sheriffs and subordinate officers, loafers and idlers, besides not an inconsiderable number of gentlemen spectators, all arrived in open row or sail boats. This great collection was from the scattering settlements of the islands, Frenchman's bay, the Penobscot river and its bay. Now you must not suppose that there was anything like fatigue or gloom or despondency in all this. Quite otherwise. It was a hearty, happy and merry meeting. Each had his story of disasters, hairbreadth escapes and ludicrous incidents. It was a hearty laugh, a good dinner and then to business. There were no old men: new countries have no old men. We were all young men—healthy, hearty, and in full glow of joyous anticipation.[9]

Circuit riding in Georgia presents a touch of picturesque humor:

The Western Circuit is in a mountainous section of the country. The lawyers of that circuit, in going from one county seat to another, rode in sulkeys. This obsolete vehicle had only one seat, sufficient only to hold one man. Books and portfolios were carried underneath the seat. It had only two wheels. The seat was mounted on springs, immediately over the axle. The shafts were attached to the axle, and the tail of the horse, when hitched in between the shafts, was brought very near the dashboard. The weight of the rider, which was immediately over the axle, balances the vehicle, so that the shafts, on an ordinary road, rested evenly on the horse. A broken or an unbuckled bellyband, while driving up or down hill, would throw the occupant out behind or on the horse before.[10]

Turning from the courts and the bar to the people, Senator Beveridge, in his Life of Marshall, states in general terms that:

Horse racing and cockfighting served the good purpose of bringing the people together; for these and the court days were the only occasions on which they met and exchanged views. The holding of court was an event never neglected by the people.[11]

The beneficial effects of circuit riding upon the bar has been summed up:

Many older lawyers have been of the opinion that the largest and best part of the legal education of the past was this mingling of the whole Bar together in

3. Warren: History of the American Bar, 205, quoting Memoirs of the Life of William Wirt, by John P. Kennedy (1849).
4. Old Virginia and Her Neighbors, Vol. II, pages 37-38, quoting Ingle, in Johns Hopkin University Studies, Vol. III, 90.
5. Phelan, James: History of Tennessee, 207.
6. Caldwell, Joshua W.: Sketches of The Bench and Bar of Tennessee, page 73.
7. Bench and Bar of Ohio, edited by George Irving Reed, Vol. I, 63.
8. The Bench and Bar of Illinois, edited by John M. Palmer, Vol. I, 15.
9. Maine: A History. Edited by Maine Historical Society, Vol. III, page 723, quoting autobiography of Judge William Crosby.
10. Branham, Joel: The Old Court House at Rome, Georgia, page 15.
11. Beverage: Life of Marshall, Vol I, page 364.

> travelling from county to county, and from court to court, the enforced personal relations which were brought about, and the presence of the younger members of the Bar during the trials of cases by their seniors.[18]

II

The people are no longer dependent upon court sessions to receive the news of the day, or to learn about and discuss the doings of the politicians. The lawyers are no longer compelled to saddle their horses for long journeys in order to earn a livelihood or attend court. The judges can travel by rail or motor car without discomfort or inconvenience, and be accommodated in well-appointed hotels, usually with every convenience at hand.

It may seem strange to inquire: Has the passing of Circuit riding been a mark of progress?

When matches were invented the flint and steel were laid aside. The power loom supplanted the spinning wheel. Horse cars are superseded by trolleys. No one would use a muzzle loading firearm today, any more than think of traveling from Boston to Philadelphia by stagecoach.

But the wireless telegraph has not eliminated telegrams by wire. The horse and wagon are not displaced by the automobile. Sailing vessels still ply the seas in company with steamers. Gas is a competitor with electricity. Neither fountain pens nor the typewriter have driven out the pen holder and steel pens.

As civilization advances a distinction must be made between those agencies which shall be wholly cast aside in the march of progress and those which are only partially superseded. The latter include all contrivances and methods whose function is not completely performed by the newer device or system. At times care must be exercised lest the older be relegated into disuse before all of its advantages have been carried forward in a better or at least equally good form. If perchance certain of these advantages are subtle and not readily discernible, the likelihood of thoughtless discard is multiplied.

It is not to be wondered at that, as cities grew in number and size, as railroads extended their facilities, as the marvels of electricity flashed information to and from remote corners of the land, and as newspapers and magazines covered the earth, circuit riding gradually fell into decadence. Probably the cavalcade of lawyers breathed a sigh of relief.

Not until recent years, not until circuit riding had passed, would it have been possible to appreciate the ramifications and importance of its erstwhile significance. This was an institution of the country. Its decline and fall mark what now clearly appears as a lowering of the Courts and of the bar in the estimation of the people.

> Taking a general survey of the facts of today, as compared with those of the middle of the last century, it is clear that the Bar counts for less as a guiding and restraining power, tempering the crudity or haste of democracy by its attachment to rule and precedent, than it did then.[19]

Breaking the contact which existed when circuit riding was in vogue between the populace and our judicial system has resulted in a general public loss.

The loss of the whetting of mind upon mind and principle upon principle, of the exchange of experiences, of the consideration of public questions, of professional co-operation and brotherly love, all engendered by the extended comradeship, enforced conferences and public or semi-official character of the lawyers upon the circuit is enormous and as yet unretrieved.

III

Why need these losses be charged off? It is not too late to affect a recovery.

The most far-reaching advantages of circuit riding were too subtle to be recognized until the institution had passed wholly into discard, without an adequate substitute first having been provided. Concisely, the benefits of circuit riding for which a substitute should be provided are:

1. The frequent, periodic gatherings and discussions of the bar.

2. The close sympathy and contact between the people and their balance wheel, the judicial establishment.

The growth of bar associations in the United States was contemporaneous with the decline of circuit riding. But bar associations are not a substitute for the coming together of the bar on the circuit. The lawyers of our country stand in need of an active institution whereby they may be induced to gather together often and regularly—whereby they may be enabled to appreciate their individual responsibility to the profession and the nation, realize their associated power, maintain surveillance of influences both within the bar and without which affect the practice of law, devise sound measures to meet deficiencies and imperfections in our laws, government and political structure, overcome undue fear of new ideas, and co-operate with associations of other professions and of business, and especially with the body of the people, for the upbuilding and general welfare of the country. This institution, to be adequate, must come home to the lawyers and each of them—must call forth their active participation in a manner equal to the genuine participation of the bar in the years gone by when on the circuit.

The creation of an active, adequate organization of the bar, difficult and laborious as it may be, is simple and easy in comparison with devising and establishing an adequate and appropriate means for reviving the sympathetic contact between the people and the legal profession which existed when the bar rode the circuit. But this can be done. To accomplish it will require two things: first, that the lawyers exert themselves to intermingle with the people, and second, that the people respond by at least co-operating in arranging opportunities for general public discussions of current civic problems. A better acquaintance between the lay and professional members of society will go a long way toward relieving the existing tension and unrest. The press can lend invaluable assistance. Festivals or other form of gala days might be arranged. Or periodically a designated day might be set aside on which such matters would be discussed in all public meeting places. The details need not be worked out here. On such occasions of course the lawyers would not do all the talking.

It is not pretended or claimed that the legal profession should "run the country." The underlying and chief merit of circuit riding was the give and take between the trained professional minds and the practical lay minds, the spur to the bar and the enlarging of the view of the people. This intimacy was a powerful factor in the early life of our nation, and insured the soundness of the foundations of the government.

18. Warren: History of the American Bar, 206.
19. Bryce: American Commonwealth, 1918 edition, Vol. II, page 678.

PROBLEMS OF PROFESSIONAL ETHICS

Review of Schwarz Case in New York, in Which Respondent, After Being Cautioned by Court for Sending Out Self-Laudatory Solicitations for Professional Employment, Was Finally Disbarred on Repetition of Offence, the Court of Appeals Sustaining the Order

FOR those of our readers who do not have time or opportunity to keep track of the running contest, in the courts and in committees, with lawyers who persist in advertising, a consideration of the Schwarz case in New York (186 N. Y. Supp. 535, on appeal, 231 N. Y. 642) may prove not only of interest but of value.

In 1916 Schwarz, a lawyer, was respondent in a proceeding in the Appellate Division First Department (161 N. Y. Supp. 1079) in the Supreme Court of New York. He was charged with misconduct as an attorney-at-law by reason of the methods he employed in sending out soliciting letters, circulars and advertisements. For this the court censured him; but stated that upon his refraining from further use of such methods no further action would be taken. He was, however, warned that such conduct would not be tolerated and a repetition thereof would lead to disbarment.

Notwithstanding this, the respondent later sent out 4500 letters, soliciting business. The letter-head bore his name as attorney and counsellor at law; the principal address being given as 299 Broadway, New York. But the letter-head also carried the words "Detroit, Dime Bank Building; Philadelphia, Land Title Building," etc., suggesting the inference that he practiced law in half a dozen leading cities beside New York.

The recipients of the letters were informed and inquired of:

> My records disclose that I have not received any items of business from you for some time. I want to ask you—why? Is there a reason? Please be *frank with me* and tell me. I want to correct any misunderstanding that may have arisen between your good office and mine.

The letter then spoke of the collection department of the writer being in charge of one of the best collection men in the country. "In all offices I maintain a staff of experienced and able attorneys," and the recipient was urged to get up a list of delinquent accounts and send or telephone them in. An early, specific and favorable reply was also urged.

Respondent also for several years subsequent to 1916 used cards as well as letter-heads and other stationery, conveying substantially the same information as above noted with reference to his practicing in various cities.

It appeared further that in 1917 he applied for admission to the bar of the State of Michigan, but was refused; and never was admitted to the bar of that state; or to the bar of the State of Pennsylvania. Admitting that he had sent out 4500 letters as above noted, respondent claimed that they were sent only to former clients. Without determining the truth of this defense, the court notes that the letter is obviously a self-laudatory solicitation for employment for professional services; and can only be properly characterized as a wholesale circularization for the purpose of obtaining business.

The case is further significant by reason of the fact that on the first attempt to disbar the respondent, a member of the court voted to disbar him; but the majority accepted his representations that he would cheerfully accept and abide by the rule for his guidance laid down by the court, and contented themselves with a severe censure and the admonition: "Respondent and the bar generally are warned that such conduct is not to be tolerated and repetition thereof will lead to disbarment."

The same respondent's conduct was also drawn in question over moneys which were collected by his Pittsburgh office; and it was sought by summary proceedings in the Supreme Court of New York directed against him as an attorney at law to recover of him certain funds collected by that office less charges. While in that case the New York court held that the relation of attorney and client never existed between the claimant for the fund and respondent—yet it further held that the facts disclosed by the proceeding called for investigation as to whether respondent's representations were intended and calculated to deceive, in that his letter-head was calculated to create the impression that he maintained offices other than his New York office, as an attorney, in the cities enumerated in the letter-head; and the court indicates that the matter should be referred for appropriate action to the New York County Lawyers' Association which had instituted the earlier disciplinary proceeding against him. (See 181 N. Y. Supp. 87.)

On the second petition to disbar, respondent again "expressed his desire to abide by any direction the court might see fit to make," but the court was not to be caught a second time; and held that in view of the fact that respondent had not heeded the sharp warning he had already received, an order for disbarment would be entered.

This same case later went up to the New York Court of Appeals, (231 N. Y. 642) and is there affirmed; although in a dissenting opinion Pound, J., remarks (p. 644), after quoting from the 27th canon of the American Bar Association Code of Ethics touching advertising, "that each deviation from the canons calls for the exclusion of the offender from the select fellowship of the bar is probably not seriously contended by any one," and then continues (p. 645):

> The appellant's general good character is unquestioned. He had done nothing worse than to write letters to former clients asking why no items of business, i.e., accounts for collection, had been received for some time and soliciting a continuance of former patronage. An attorney may write such a letter to one former client without violating the canon. If he so writes to all his former clients in decent and moderate terms, he does no evil thing. Appellant has regarded the former admonition of the court to refrain from the extravagant, crude and flashy advertising addressed to the public at large, which was compared by Clarke, P. J., in the opinion of the court, to "the advance bills of the late P. T. Barnum in heralding the approach of the greatest show on earth."
>
> This court interferes with extreme reluctance with the disciplinary powers of the Appellate Division which are properly exercised to uphold high and worthy standards of professional conduct, but such powers do not include the power to disbar an attorney for asking his former clients to continue or to renew their patronage.

Four of the Justices of the Court of Appeals con-

curred in sustaining the order of disbarment; three dissented.

In the issue of the JOURNAL of last October, we state that no instances where disciplinary action (barring reprimands) based solely on advertising has been taken, where divorce is not concerned, have been brought to our attention. The Schwarz case, however, is literally an advertising case; but it appears unlikely that the court would have disbarred the respondent there had it not been for the fact that through the inferences to be drawn from his advertising letters, the facts about his practice were misstated.

As already noted, more than once, in this column, the courts when dealing even with advertisements which offend the sense of propriety entertained by the bar generally and universally, are extremely reluctant to go beyond a "reprimand" or "censure." This leaves the way open for enterprising shysters to solicit business from strangers and still count on remaining members of the bar. In order to protect itself and its honorable members, the bar should see to it that no lawyer guilty of even once advertising or soliciting business from strangers, in violation of canon 27, shall still remain in good standing among his associates at the bar; and for even a first offense a suspension from practice for thirty days would be most wholesome.

Perhaps some court can be found which by disciplinary action of this character will aid the profession in keeping up its standards.

RUSSELL WHITMAN.

LETTERS OF INTEREST TO THE PROFESSION

Are Courts of Review Struggling with Impossible Demands on Time and Attention?—Wadsworth-Garrett Amendment—How Bar Can Promote Good Citizenship—One Way of Helping Relieve Federal Court Congestion—Judicial Ethics —Attractive Nuisances

Are Courts of Review Breaking Down?

Chicago, Nov. 28.—*To the Editor:* When the government was founded, the Supreme Court of the United States was the one federal court of last resort; and it is that today. The nation then had a population of three or four millions; it has thirty to forty times that today. Its commercial and industrial life is immeasurably more complex.

In 1818, when Illlinois first attained statehood, its population was equal to that of a single Chicago ward today; its population has multiplied one hundredfold since then, and throughout that time it has had its one court of last resort, the Illinois Supreme Court. The story of other states rapidly growing in population and industry is essentially similar.

In the nature of things the United States can have but one court of last resort, and each of the states can have but one such court; and each of these courts is now called upon to do many times the work it had formerly done. Relief afforded by the creation of intermediate courts of review has been but a palliative; these courts have in their turn become overworked, and the demands upon the courts of ultimate authority have grown apace. Furthermore, with the multiplying of appellate tribunals, much has been added to the uncertainty of the law itself, an evil which the very creation of such tribunals is intended to overcome; thus defeating the very purpose, or one of the chief purposes, of their creation. Again, in the nature of things, this situation is becoming and will continue to be progressively more difficult. A moment's reflection will suffice to confirm that, even aside from personal experience and observation.

Besides the increasing mass of litigation itself, there is another element which contributes to the difficulties under which these courts are laboring, and that is a tendency on the part of both records and briefs to become increasingly voluminous. Evidence is being presented with more and more exhaustiveness in the trial courts, and the law is, in the reviewing courts; and there are annually added thousands of decisions to draw from. The result is that even now printed volumes of matter reach the reviewing courts which unquestionaly are beyond even their physical capacity to read through, to say nothing of the required time for assimilating, digesting, verifying, investigating and weighing and deciding, all of which processes, painstakingly and carefully performed, are essential to a proper disposition of cases and to an exact administration of justice; and a case which has been carefully tried and properly presented in the reviewing court by competent counsel should bring to that court but little waste matter which ought safely to be disregarded. Yet, undoubtedly, notwithstanding the general reductance to admit the fact, short cuts in the disposition of cases are practiced—of the nature of which only those who have sat on these tribunals can speak with authority; but of the results of which only those who as counsel had labored in the cases can have much knowledge. Those results cannot be appraised from a mere reading of the reported cases, for most opinions on their face "read well." Criticism by the lawyer whose client had suffered from a given decision is given but slight tolerance; he is expected to be in a frame of mind "to swear at the court."

And yet situations do arise (known only to the counsel in the case) in which the decision is so manifestly wrong that criticism cannot be disposed of as a mere difference of opinion; and when that happens often enough the feeling grows that the courts in question cannot adequately handle the business pressed upon them, and that justice suffers. For the reasons stated, statistical analysis is difficult or impossible. Yet the experience of a limited number of lawyers may serve as a basis for drawing some general conclusions.

Following are actual instances within the writer's own knowledge (except where otherwise stated) of decisions by courts of review, from the Supreme Court of the United States down.

First: Deciding a case on the strength of an authority holding exactly the contrary.

Second: Failing to take notice of a contention which, if sustained, would have been decisive, and reaching the contrary conclusion at the same term of court where a similar contention was upheld.

Third: Reaching opposite conclusions in two cases coming up on the same record, one being a carbon copy

of the other. This instance was cited to the writer by a federal judge as occurring in his practice.

Fourth: Holding contrary to the overwhelming weight of authority in other jurisdictions, without even taking notice of the fact in the opinion, or stating reasons for not following the weight of authority.

Fifth: Basing the decision upon the alleged ground that contentions advanced had not been raised in the court below, whereas the record, abstracts and briefs plainly and prominently pointed out those contentions.

Sixth: (On the authority of a brother lawyer) reversing a judgment of the trial court upon alleged evidence which was sufficiently misquoted to permit of a different result.

In nearly each instance, petitions for rehearing in vain pointed out the particular omission or misconception; rehearings are no longer indulged as they were by their English lordships, keen and exact, if ridiculously be-wigged. As one member of a reviewing court expressed it, rehearings are now granted once in a "blue moon."

Three queries present themselves:

First: Is it at least likely that conclusions in cases other than those instanced might have been different upon adequate consideration?

Second: Is it further likely that the experience of other lawyers may prove more or less similar, if similarly examined?

Third: And following upon the other two, are the reviewing courts struggling with demands upon their time and attention to which they cannot adequately respond? Does the average case obtain a real hearing at the hands of courts of review, or is the appellate system breaking down?

In this letter it is not intended to offer solutions. It is only intended to draw attention to what is at least a serious problem—one rapidly growing in difficulty to both the bench and to the profession—a difficulty which cannot be made worse, but may be helped by dissolution. JACOB G. GROSSBERG.

The Wadsworth-Garrett Amendment

Baltimore, Md., Oct. 31.—*To the Editor:* In the issue of your JOURNAL for October, 1922, on page 649, there appears a letter from Mr. G. C. Allen of Stockton, Cal., criticising the proposed Wadsworth-Garrett Amendment to Article V of the United States Constitution. Mr. Allen deprecates the tendency either to limit the scope of the powers of legislatures, and hence their sense of responsibility as representatives of the people, or to substitute for that responsibility the appeal by the referendum to the irresponsible individual voter.

I fully agree with his sentiments, but not with his construction of the proposed amendment, for it seems to me that this measure carefully avoids giving way to either tendency. The necessity for legislative ratification of federal amendment is just as strong under the Wadsworth-Garrett amendment as under the existing article. The only substitute permitted is, as now, ratification by conventions to be called in each state for the purpose, if Congress chooses that method. A noticeable improvement is that in the always possible event that a national convention for proposing amendments should be called, that convention may exercise the choice, now limited to Congress itself, between the two possible means of ratification.

The principal changes to be wrought by the Wadsworth-Garrett amendment are, first, to require the submission of amendments to substantially *new* legislatures, instead of hold-overs, and, second, to permit the States to hold referendum elections after ratification by their respective legislatures. These elections cannot operate as substitutes for legislative ratification, but merely afford to the voters a practical veto power over ratifications in defiance of their sentiments. They cannot ratify what the legislature has rejected, but may reject what the legislature has ratified. Even this can only be done if the State's Constitution or statutes provide that it may.

The first provision, for a legislature with a fresh mandate, is not only in line with our early institutions where legislative elections were much more frequent than now, and holdover legislatures almost unknown in many States, but is also in accord with the workings of the present British Constitution. In England constitution changes, such as the abrogation of the veto of the House of Lords, by common consent require a general election and adoption by a House of Commons bearing a fresh mandate on the issue. It surely is a proper provision to afford the people a voice as to the constitution or form of government they are to live under, especially since amendments with us are practically irrepealable. T. F. CADWALADER.

How Bar Can Promote Good Citizenship

Seattle, Wash., Dec. 1.—*To the Editor:* I have read with a good deal of interest the proceedings of the American Bar Association at San Francisco, and particularly that portion of it which refers to the teaching of American citizenship and the danger that threatens our American institutions from the propaganda of class consciousness. It has been apparent to any observer for a number of years that if the teaching of the radicals were permitted to go unchallenged it would spell disaster to our form of government.

In order to combat this pernicious propaganda, though in a very small way, the undersigned has for a period of more than ten years conducted classes in citizenship at the Y. M. C. A. and other organizations for those of our foreign born who wish to become citizens of the United States, devoting at an average of one evening a week to that work; and I am of the opinion, from my knowledge of the foreign born, that we have nothing to fear from them, provided we take the pains to explain and tell them of our form of government, as I have yet to find the first one who has taken the studies offered in that class and become thoroughly grounded in the principles of Democracy, who has fallen a victim to the insidious propaganda of the Red agitator.

I am at the present time having a class in the lower part of the city, where only the so-called "down and out" congregate, with more than half native born citizens, and these seem to like the instructions quite as well and take as much interest in them as the foreign born.

All that is necessary is that we shake ourselves out of our self-complacency and smugness and carry the good news of constitutional government to the less informed, and there is no class better fitted to do this than the members of the bar, who owe it to the community to make some contribution of their time and talents to the general good. No great sums of money are required. All that is necessary is that the local bar associations undertake this work in their several localities, and see to it that no one, whether native born

or foreign born, will go untaught as to the principles of our form of government. This is one of the very best ways I know of to defend the Constitution which we have sworn to uphold. CARL J. SMITH.

To Relieve Federal District Courts

Napa, Cal., Oct. 25.—*To the Editor:* It would seem that after a year's experience with the enforcement of the Volstead, or rather the National Prohibition Act of the Revised Statutes of the United States Penal Code, Congress would create a method, by which this Act could be expeditiously handled and at little or no expense to the government, by following the rule as laid down in the States as to the law governing the offices of justices of the peace in each county in each State in the Union, by way of United States Commissioners with powers to adjudge guilty or not guilty, and impose and collect fines or imprisonment as the judgment may be.

Should this method be adopted by Congress, the whole Union would be functioning in a manner that would at all times keep clear the channels of congested calendars and each State in the Union would not now be clogged with its tens of thousands of untried cases.

The mode of compensation should be by putting the United States Commissioners on a salary basis, and all enforcement officers on a fee basis and the fines exacted would not only pay the expense of the enforcement officers, but would go a long way to aid in the other expenses.

The qualifications of United States Commissioners should be at least attorneys with State and federal licenses.

And there is a feature in this present method of enforcement that lowers the dignity, in my opinion, of a United States District Court, for it makes it function in the realms of a petty "police court atmosphere," when it should be functioning in higher and more complicated legal entanglements. JAMES M. PALMER.
U. S. Commissioner.

REVIEW OF RECENT SUPREME COURT DECISIONS

(*Continued from Page 751*)

a real estate broker's license or salesman's license, or any of the officers or members of any such applicant, prior to the issuance of any such license. The Commission is expressly vested with the power and authority to make, prescribe, and enforce any, and all, such rules and regulations connected with the application of any license, as shall be deemed necessary to administer and enforce the provisions of this Act.

On appeal to the Supreme Court the judgment was reversed and the cause remanded.

Mr. Justice McKenna delivered the opinion of the Court. He stated the view of the lower court as follows:

> The condemning comment of the Court was that Section 8 authorized the Commission, not only to require an applicant to furnish evidence of his qualifications, but to *procure* independently of the applicant any proof it may deem desirable, and this without any provision for notice or opportunity to meet the evidence so procured, nor even to be advised of the nature or source of the evidence. Because of this delinquency the court was of opinion that the Act did not afford due process of law and was, therefore, unconstitutional and void.

To this contention the learned Justice replied in part:

> . . . . The words are "require and procure." They seem to have independent and cumulative meaning, one demanding publicity, the other permitting secrecy. But to this possibility we are not disposed; we prefer the admonition of the cases and their decision as expressed in *United States v. Jin Fuey Moy*, 214 U. S. 394, 401, as follows: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score, (citing case)."
>
> In the cited case the admonition is said to express an elementary rule; and we think the statute of Tennessee attracts instead of repels the admonition. The statute is drawn with care to details and their importance, importance to the business regulated and the persons who will desire to engage in it, action under it was intended, therefore, to be open and direct, not to be remitted in any part to secrecy, prejudice or intrigue.
>
> In conclusion, we may say, that if the word "procure" is more than a tautological repetition of the word "require," it was only to confer the power of affirmative direction upon the Commission, necessarily to be exercised in supplement to the action of the applicant and with the same publicity and opportunity of the applicant to meet adverse evidence. And the Act construed as we construe it will take no power from the Commission necessary to the performance of its duties, and will leave no power with it that it can exercise to the detriment of any right assured to an applicant for a license by the Constitution of the United States.

Messrs. M. M. Neil and Nathan W. MacChesney argued the case for appellants and Mr. Elias Gates for appellee.

Taxation—Federal Income Tax

The income from a residuary estate devised to a charitable corporation, but held in trust for the corporation subject to an annuity, is not subject to taxation under the Income Tax Law of 1918, where the charitable beneficiary is actually receiving the full income less only the amount of the annuity.

Lederer v. Stockton, Adv. Ops. 4, Sup. Ct. Rep. 5.

The Pennsylvania Hospital, a charitable corporation, was the residuary devisee of an estate, subject to the payment of certain annuities. The Supreme Court of Pennsylvania held that the income could not be paid outright to the Hospital until the death of all the annuitants, and that until then it must remain under control of the trustee appointed by the will. When all but one of the annuitants were dead, the trustee transferred the whole fund as a loan to the Hospital for fifteen years, secured by a mortgage on property of the Hospital, the Hospital paying only enough interest to satisfy the annuity—$800 out of the total income of $15,000.

The trustee claimed that the income was exempt under Section 11 (a) of the Income Tax Law of 1916, exempting income received by any charitable organization, but the internal revenue collector levied a tax on the entire amount, as income received by an estate of a deceased person during the period of settlement (Section 2b). The trustee brought suit in the District Court and obtained a judgment which was affirmed by the Circuit Court of Appeals for the Third Circuit, and again by the Supreme Court.

The CHIEF JUSTICE delivered the opinion of the Court. He said:

> This residuary fund was vested in the hospital. The death of the annuitant would completely end the trust. For this reason, the trustee was able safely to make the arrangement by which the Hospital has really received the benefit of the income subject to the annuity. As the hospital is admitted to be a corporation, whose income when received is exempted from taxation under section 11(a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the Hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress.

The case was argued by Assistant Attorney General Ottinger for the Collector of Internal Revenue and by Mr. Maurice Bower Saul for the trustee.

STATE AND LOCAL BAR ASSOCIATIONS

"Sample" Bill Defeated at Referendum Election in California—Illinois Bar Honors Supreme Court Judges—Kansas Association Proposes Convention Plan to Nominate Judicial Officers—Closer Relations Between State and Local Associations Sought in Ohio—Other News

CALIFORNIA

Act to Prevent Practice of Law by Unauthorized and Unqualified Parties Defeated on Referendum After Hot Campaign

At the election of Nov. 7, the so-called Sample Bill, a measure designed to prevent the practice of the law by corporations and other unqualified, unauthorized and unlicensed persons, was refused approval by the people on a referendum. The purpose of the measure was, in the first place, to enable the courts and the bar to prevent disbarred attorneys, who are at present only prohibited from appearing in court, from maintaining offices, advertising themselves as lawyers, and giving legal advice; and, in the second place, to prevent trust companies and other corporate interests from advertising to give advice, whether free or for a fee, and from drawing wills naming themselves as trustees and tying up estates for long periods of time in trust.

The measure had its inception in the practice of certain trust companies, particularly in Los Angeles, of advertising to furnish legal advice and to draw wills free. Protests from the lawyers of Los Angeles, as far back as 1916, resulted in agreements on the part of the trust companies in question to desist from the practices complained of, which agreements, it is charged, were not kept. Other circumstances aggravated the situation until finally, a bill was drafted by a committee of the California Bar Association, approved by the Association at its Santa Cruz convention in 1920, and presented to the Legislature in January, 1921, for enactment by Senator E. P. Sample of San Diego, a member of the bar. After amendment in some minor particulars, the bill, after a full hearing in joint session of the Judiciary Committees of both houses and very full argument on the floor, was passed and signed by the Governor, who also held a public hearing upon the bill before affixing his signature. The operation of the law was suspended by referendum secured by the California Bankers' Association, which directed the fight against it.

The campaign in favor of the bill was made by the bar of California, under the leadership of Hon. Jeremiah F. Sullivan, president of the Bar Association of San Francisco, and chairman of the California Bar Association Campaign Committee, and Harry A. Hollzer, of the Los Angeles bar, State Campaign manager. No man ever gave more whole-hearted devotion to a cause than did these two. The best element of the bar supported the measure and worked energetically for its approval by the people, but in the face of a big campaign fund disbursed with prodigality in newspaper advertising and in other ways, their efforts were in vain. The fight against the bill was managed by an organization known as the Public Rights League, which was regarded as a camouflage for the interests affected. It played upon the prejudice of the public against the bar and upon the idea that by the enactment of the bill they would be prevented from getting something for nothing in the shape of legal advice.

As an evidence of the methods used against the measure, the most effective weapon of the opposition was a cartoon entitled "The Lawyers' Bill," which depicted "Mr. Common People" shelling out for "another tax" for lawyers fees for advice upon every subject under the sun. As a matter of fact there was nothing in the measure that in any manner increased the emoluments of the lawyers or tended to drive the public into a lawyer's office to pay a fee for any advice or service that they had been accustomed to secure from a banker, real estate man or notary; nor did it in any manner interfere with any of the legitimate functions of banks or trust companies. It was directed solely against known abuses and was altogether in the public interest, upon which ground its approval was advocated by the lawyers, who pointed out the dangers that menaced the people under present circumstances.

One effect of this campaign and of the defeat of this measure has been a greater solidarity of the bar and the development of a belief that something must be done to remove the prevailing popular prejudice against lawyers. Nor is the fight for the principles involved in the Sample Bill at an end. Steps will be taken at the coming session of the Legislature which meets in January, 1923, to remedy the evils complained of and to prohibit the practice of the law by corporations, including trust companies and other unauthorized persons, including disbarred lawyers.

ILLINOIS

Addresses at Annual Banquet by Chief Justice Floyd Thompson and Chairman Hooper of Railroad Labor Board

The annual dinner of the Illinois State Bar Association, in honor of the Supreme Court of the State, was given December 2. It was a highly successful affair. Previous to the banquet there was a reception to the justices of the Supreme Court and their wives, and to Hon. Ben W. Hooper, Chairman of the Railroad Labor Board, who were guests of the Association. Hon. Bruce A. Campbell, president of the organization, presided at the banquet. Addresses were made by Chief Justice Floyd E. Thompson, of the Illinois Supreme Court, and by Mr. Hooper.

Judge Thompson's address pointed out in forcible language the dangers of certain conditions obtaining in this country at present, touching particularly on the multiplication of Federal employees, paternalistic tendencies in legislation, demagoguery in high places, the delusion growing more wide-spread that work is an affliction rather than a means to happiness and self-development, and the undemocratic tendency of society to divide into selfish groups and classes. His

remedy was for the citizens of the country to become politicians and quit being political slackers.

Chairman Hooper's address took up first the political program of the labor leaders, with its demand for a limitation of the powers of the courts. He declared that this program went more deeply to the root of the existing order than many of their proponents seemed to imagine. He then discussed the various proposed methods of dealing with the labor situation in the railway industry. In this connection he stated that it was but just to say that the decision of the Railroad Labor Board had been evaded and violated more frequently by railroads than by employees, though a large majority of the big railroads had shown a fine spirit of cooperation with the Labor Board. He concluded by pointing out that there was no body of men in the country more capable of combating and confounding those who ignorantly or designedly spread the doctrines of class hatred and of disloyalty to our institutions than the American Bar.

Thursday evening, November 16, the Chicago Bar Association gave a banquet to Hon. James H. Wilkerson, newly appointed Judge of the Federal District Court for the Northern District of Illinois. President Roger Sherman presided and other federal judges and notables of bench and bar were the guests of honor. During the course of the dinner the Glee Club, under the direction of Mr. John D. Black, rendered various songs, in the choruses of which the assemblage joined. Hon. Edward J. Brundage, Attorney-General of Illinois, introduced the guest of honor, who spoke of the responsibility resting on the federal judge so to conduct himself that by no act of his should disrespect be brought upon our great plan of government, of which the judicial power is such an important part, and, in detail, of the correlative duties which came with such responsibility. Hon. Francis E. Baker, of the United States Circuit Court of Appeals, and Major Edgar B. Tolman of the Chicago Bar, also made addresses.

KANSAS

Important and Fruitful Annual Meeting Held—Work of Commission to Revise Statutes Approved—Convention Plan for Nominating Judicial Officers Recommended

The Kansas Bar Association met this year at Salina in a two days' session. Under the able guidance of Hon. Chester I. Long, President of the Association, the meeting was conceded to be the most interesting ever held by the Kansas Bar. Instead of long, formal and often dull papers, three questions of the utmost importance were presented to the Association and passed upon after a very general and keen debate.

The first was the question of legal education. The committee on that subject had submitted the plan of the American Bar Association, requiring three years work in a law school. The debate on this was very keen and interesting. In the end the present rule, requiring all the time of a student for three years to be devoted to the study of law, remained in force.

The second interesting question was the report of the Commission which has been revising the Kansas statutes, appointed by the Supreme Court in March, 1921, under an act of that year, composed of Hon. Chester I. Long, Hon. F. Dumont Smith and Hon. Hugh P. Farrelly. The Commission has completed its report and has issued a compendium of its work in the form of advance sheets and sample pages of the statutes, which were sent to every lawyer of the state for their perusal before the meeting of the Association. F. Dumont Smith explained briefly the work of the Commission and the plan which it had followed. The Association unanimously approved the work of the Commission and appointed a committee of eight to push the matter through the Legislature, if possible. The chances for the adoption of the revision seem very good.

The third question was the report of the committee appointed at the 1921 session of the Association to adopt some plan other than the direct primary for the nomination of Judicial officers. The Committee reported a convention plan, consisting, first, of a County Convention, the delegates to which are elected at the regular primary, the County Convention to select delegates to the District Judicial Convention and to the State Judicial Convention. The District Judges of the state by a considerable majority in their meeting of the day before opposed the plan of their nomination by a convention, seeming to prefer the primary, and they made a fight in the Association, but were overwhelmingly beaten, and the report was adopted by a majority of more than three to one. The Committee was instructed to complete the bill and present it at the next legislature.

Hon. W. C. Harris, Judge of the Fifth Judicial District, was elected President for the ensuing year; James A. Allen, Chanute, Vice President; W. E. Stanley, Wichita, Secretary; Forest D. Siefkin, Wichita, Treasurer; and the Executive Council, Ed. S. McAnany, Kansas City; Chas. L. Hunt, Concordia; R. M. Hamer, Emporia; Robert Stone, Topeka; and F. Dumont Smith, Hutchinson. The Association will meet at Kansas City, Kansas, in 1923.

Two unusually interesting addresses featured the meeting. The first, the Annual Address by Charles Thaddeus Terry of New York, on the subject, "Law and Order in Industrial Disputes," and the second by Hon. R. E. L. Saner of Dallas, Tex., on the subject of 'American Citizenship." The address of Mr. Terry was enthusiastically received by a large audience and was one of the most brilliant and profound addresses ever made before this body.

The annual dinner on the evening of the 28th was the most largely attended the Association has ever had. It was addressed by Mr. R. A. Lovitt of the Salina Bar, Judge Henry F. Mason of the Supreme Court, and Hon. R. E. L. Saner. Mr Saner's able address was enthusiastically received.

The general opinion was that it was the most important, interesting and fruitful meeting the Association has ever had. W. E. STANLEY, Sec.

OHIO

Association Appoints Permanent Executive Secretary—Plans for Mid-Winter Meeting Being Made—Closer Relations Between State and Local Associations

For the first time in its history, the Ohio State Bar Association has appointed a permanent executive secretary who will devote his entire time to organization work and publicity for the Association. Robert C. Mason, the new secretary, has his headquarters in Columbus and will direct the activities of the association along the lines now followed by the more closely

organized professional groups such as the Ohio State Medical Association.

Plans now are being made for the Mid-Winter Meeting of the Association to be held in Columbus, January 26 and 27. Although at present there is hearty co-operation between the State Association and the local bar associations, it is hoped that during this meeting there can be devised an acceptable plan bringing about a more definite affiliation between the State and local organizations.

To promote this union and to make it more agreeable to attorneys who are not members, the State Association is going to render a direct service to the Ohio lawyers. This will not in any aspect be in competition with the legal publications in the state, but will be in co-operation with the said publications. Details of the plan are to be published after the session in January.

The Mid-Winter Meeting will have three phases—business, entertainment and a consideration of questions that have a national importance. The Executive Committee, headed by Hon. George B. Harris, Cleveland, has charge of the program from the business standpoint. He has secured as speakers Solicitor General James M. Beck and Hon. Nicholas Murray Butler, President of Columbia University since 1902. Neither Solicitor General Beck nor President Butler needs an introduction, as both are well known to the legal profession, not only nationally but internationally. Mr. Beck has recently returned from abroad where he delivered a series of lectures on the American Constitution. In Paris the American Solicitor General was the object of special attention when the Cour de Cassation interrupted debates and invited him to come into the enclosure where the court was sitting and to take a place at their side, an honor without precedent.

President Butler was first known abroad as a student in universities at Paris and Berlin. Recently he received the degree Jur. D. from the Universities of Strasbourg, Prague, Nancy, Paris and Louvain. He has received degrees from the University of Oxford and University of King's College, N. S. The Légion d'Honneur selected him as Grand Officer in 1921. He has kept in close touch with foreign parts through his membership in royal orders and associations in Belgium, Greece, Serbia and Italy.

CLEVELAND

Bar Association Waged Winning Campaign to Establish Principles Needed for Choice and Retention of Competent Judges

The Cleveland Bar Association won the fight that it made in the 1922 political campaign to establish the following principles: (1) That judicial elections should be non-partisan; (2) That judges who make a reasonably good record should be retained in office; (3) That judicial candidates who are endorsed by the Bar Association and other civic bodies, can be elected without indulging in the unseemly spectacle of touting and magnifying their personal qualifications on the stump; (4) That a judge who does his duty can be placed beyond the reach of selfish groups, possessing large voting strength, who desire to punish a member of the Bench because of judicial opinions adverse to them, notwithstanding the opinion may be right, from the standpoint of law and the testimony given.

These principles were established in the re-election of the entire judicial ticket, as follows: John J. Sullivan, Judge of the Court of Appeals; Homer G. Powell, Maurice Bernon and Frederick P. Walther, Judges of the Common Pleas Court; and George S. Addams, Judge of the Insolvency Court.

The members of the Bar went into this campaign believing, that if it is once established that judicial candidates will be elected on their qualifications rather than their ability as handshakers, that a judge who has made a creditable record can have a reasonable assurance of continuance in office, the judiciary may attract many able lawyers who in the past have refused to be candidates, because of the uncertain tenure of the office and the undignified scramble which they had to make to attain and retain, judicial honors. In making its endorsement this year, the Bar Association followed the suggestion of the Cleveland Foundation, made in its report of a survey of the administration of criminal justice in Cleveland, said survey having been conducted by the Foundation. This recommendation was: That judges who have demonstrated their fitness should be continued in office, and that lawyers, being more familiar with the work of the judges than any other group in the city, ought to pass on the records of members of the Bench.

The Cleveland Bar Association conducted a referendum vote among the members of the Association. The ballot that was mailed contained the question, "Should Judge ——— be retained in office?" The balloting resulted in an endorsement of the work of the judges aforesaid, by practically unanimous vote. They were declared the nominees of the Association. A Campaign Committee was then appointed by President John J. Sullivan, as follows: George B. Harris, John A. Cline, H. E. Varga, Wm. B. Woods, T. H. Garry, W. K. Stanley, Wm. Rothenberg, S. V. McMahon, Alexander Martin, Carl D. Friebolin, Wilfred J. Mahon, Paul Howland, F. E. Stevens, Frank A. Quail, Cleaveland R. Cross, Lillian M. Westropp, B. D. Nicola, Walter L. Flory. The Campaign Committee after making preliminary arrangement for activities on behalf of the judges, turned over to the following executive committee the work of directing the campaign: Paul Howland, Chairman; Jos. C. Hostetler, Mary B. Grossman, Chas. M. Buss, A. V. Abernethy, John A. Hadden.

For the first time in the fifty years of the Association's existence campaign headquarters were opened, rooms being maintained at 1109 Ulmer Building. Wm. R. Pringle, a young lawyer of the Bar, was placed in charge. All the departments usually maintained by a political party campaign headquarters were established by the Bar Association. Francis B. Kavanagh, a member of the Bar, was in charge of the Speakers' Bureau and the Bureau on Organization. Mary B. Grossman, a practicing lawyer, was in charge of organization work among the women's clubs, and she also had charge of the task of providing speakers for meetings of the women's clubs.

It would not be worth while to outline all the activities carried on by the Campaign Executive Committee. Some idea may be gained of the scope of the work by the fact that 500,000 campaign cards were distributed, 41 newspapers of the county carried advertisements on behalf of the judges, 35 moving picture theatres flashed advertisements on behalf of the judges, this work being in charge of Samuel Horwitz and A. J. Roth, members of the Bar. Several more important civic organizations endorsed the Bar's candidates, among them being The Cleveland Automobile Club with 25,000 members, The Civic League, The

Cleveland Association of Building Owners and Managers, as well as the Republican Executive Committee and the Democratic Executive Committee. Many civic organizations placed campaign cards of the Bar in all of their local mail and thousands of letters were mailed.

The county undoubtedly was thoroughly aroused to the necessity of putting members of the Bench beyond the reach of selfish groups desiring to punish judges on account of certain decisions. Judge Maurice Bernon, of Common Pleas Court, who was attacked by a powerful group of organizations, received the largest number of votes cast for a candidate for Common Pleas Court. Judge Homer G. Powell, who was attacked by a wealthy Clevelander, whom he had sent to jail for contempt of court, ran second to Judge Bernon.

Following is the list of addresses for Fall and Winter meetings of the Cleveland Bar Association, some of them having, of course, already been delivered: October 17, "The Law and Labor Relations," by Newton D. Baker, former Secretary of War; October 31, "Receiverships," by Austin V. Cannon; November 14, "The Mechanics Lien Law," by David E. Green; November 28, "Some Phases of Patent Law of Interest to the General Practitioner," by John F. Oberlin; December 12, "The Growth and Development of the Police Power," by Professor A. H. Throckmorton, of Western Reserve University; January 23, "Important Phases of Admiralty Law," by Hermon A. Kelley; February 6, "How a Law Suit Looks from the Bench," by Samuel Kramer, of the Common Pleas Court; February 20, "Limit of State and Federal Jurisdiction," by Hon. Maurice H. Donahue, Judge of the United States Circuit Court of Appeals, Sixth Circuit, Columbus, Ohio; March 6, Address by Andrew Squire.

BOSTON

Problem of Determining Moral Character of Applicants for Bar Admission Discussed

Better methods of securing evidence of the character of applicants for admission to the bar than obtain at present were discussed at a special meeting of the Boston Bar Association on November 4. The Bar Examiners were criticized by some for not inquiring more thoroughly into the moral character of such applicants. One of the means proposed to deal with the situation was an amendment to the by-laws of the Boston Bar Association providing for investigation of the character of applicants by a committee on character. Speaking to this amendment, Mr. John Lowell declared that the association was in duty bound to do all that it could to keep up the standards of the bar, especially in view of recent tendencies. He said that the applicants should be interviewed face to face by the committee, which would thus be able to judge more accurately of their fitness. Mr. George R. Nutter suggested that if such a committee was decided on, it might report to the Bar Examiners and cooperate with them instead of the courts. Judge Henry M. Sheldon suggested that such an innovation might be regarded as an intrusion, and suggested that the committee would have no power to summon witnesses or even compel attendance of the applicants. Mr. Charles S. Hill pointed out that the Bar Examiners now have the duty to examine into the character of the applicant as well as his legal knowledge and fitness, and gave illustrations of the good results obtained by such face-to-face character examinations. No definite action appears to have been taken. The subject of contingent fees was also discussed but without definite action. Mr. Richard W. Hale was elected member of the Council for three years.

NEW YORK CITY

County Lawyers' Association Committee Answers Questions of Legal Ethics

The following answers to questions involving problems of legal ethics have been issued recently by the Committee on Professional Ethics of the New York County Lawyers Association:

Question No. 211.—A widow (also sole legatee) is appointed and qualifies as executrix of her deceased husband; she is without means except as derived from the personal estate of her husband; her husband left no real property, and no debts except a judgment debt which at the time of his death was about to expire by limitation unless revived against him; the judgment creditor is probably unaware of the death and available assets.

In the opinion of the Committee may the lawyer who is advising the executrix properly advise her not to take any steps to advertise for creditors, or not to account voluntarily as executrix, in the hope that the rights of the judgment creditor may lapse, and that she may thus acquire the personal estate free from his claim?

Answer.—The question implies that the judgment creditor's right is superior to that of the legatee; the Committee does not consider that the lawyer is justified in advising the executrix to disregard the rights of the creditor nor to resort to any trick or device to defeat them. Whether it is the legal duty of the executrix to advertise or whether such advertisement is merely permissive and for the protection of the executrix, is a question of law, dependent upon the proper construction of a statute providing for advertisement, and the Committee does not attempt to construe statutes nor to define statutory duties. The lawyer may, in the opinion of the Committee, properly advise his client his opinion of the statutory duty. But in the Committee's opinion it would not be professionally proper for the lawyer to devise a plan whereby the rightful payment of the creditor is defeated.

Question No. 212.—We employ a clerk who is not an attorney, to take care of our commercial collection department, under our supervision. We receive daily a number of telephone calls and inquiries regarding such cases, and in order to identify the person in charge and relieve ourselves of confusion, we are considering the advisability of printing a card and having an appropriate note on our stationery somewhat as follows:

(Telephone)
A..... and B.....
Counsellors at Law
(Address)
Commercial Dept.
.....Mgr.

In the opinion of the Committee is such a card objectionable?

Answer.—In the opinion of the Committee, the cards or stationery of a law firm should not represent a layman as conducting or managing a department of the lawyer's professional business; it lends itself too readily to the solicitation of employment or the using of it for advertising purposes by the layman so employed.

Question No. 213.—A and B are copartners in the general practice of the law. A is the holder of a substantial portion of the capital stock of the D corporation. The D corporation, in turn, is the owner of all of the capital stock of the E corporation. The D corporation is engaged in a general manufacturing business, and the E corporation is engaged in the purchase and sale of bonds and other securities. When A and B as a copartnership are requested to assist or advise in the purchase of securities for clients is there any impropriety in purchasing such securities through the E corporation which would make a profit on such transactions, provided always that the client pays no greater price than would be paid through any other brokerage house, and provided further that the recommendations of the partnership as to such securities are not influenced by the character of securities that the E corporation may at that time be desirous of purchasing or selling? In other words if the partnership exercises entire good faith in its recommendations and efforts on behalf of clients, does, the indirect financial interest of A in the E corporation make it improper for such transactions as are above enumerated to be handled through said corporation?

Answer.—In the opinion of the Committee, a lawyer should not advise the employment of a company in which

he has a personal interest, for the purpose of making investments for the client, without fully and fairly informing his client of his interest in the company.

BRIEF NOTES

San Francisco Association Indorses Proposed Legislation—Attorneys and Ku Klux Klan

The San Francisco Bar Association has endorsed legislation limiting the fees to be charged by employment agencies in that city and otherwise restricting and regulating them. The endorsement of the Board of Governors was unanimous and was brought about by the presentation of much evidence showing the evils which exist under present conditions.

Judge A. A. Johnson, Chairman of the Grievance Committee of the Springfield (Mo.) Bar Association, has raised the question of whether an attorney can be a member of the Ku Klux Klan and at the same time be true to his oath as an officer of the court. Judge Johnson states that he has been told several of the members belong to this organization, and he contends that such membership is incompatible with their oath. The matter was among those scheduled for discussion at a recent meeting of the Association.

Woman's "Right to Jury Service"

"In the case of State v. Mittle (113 S. E. 336), the defendant appealed from a conviction on the ground that there was error in refusing his motion to quash the venire of jurors on the ground that all women electors were excluded from the jury box. The Supreme Court of South Carolina held, first, that the Nineteenth Amendment did not confer the right of suffrage upon women, and secondly, that in any case ice. Moreover, the Court held that the defendant could not raise the question of exclusion of women from the jury lists, as he did not belong to the excluded class. In its opinion, the Court says that it is a popular but a mistaken conception that the amendment confers upon women the right to vote. 'It only prohibits discrimination against them on account of their sex in legislation prescribing the qualifications of suffrage, a very different thing from conferring the right to vote, which is left to legislative enactment, restrained only by the inhibition against the prescribed discrimination.'"—From *Central Law Journal*, Dec. 1, 1922.

New English Law of Property Act

"In Lincoln's Inn, the hive of conveyancers, there is much speculation on the probable effect of the Act. The equity lawyers feel they will be sailing in uncharted seas and that at first they will probably be very busy with new points which the Act is bound to raise. There is bound to be a good deal of clarifying litigation, if I may use that term, during the next few years; but no one doubts that the ultimate effect of the Act will be so to simplify the law as to remove the need for much of the conveyancing now done and materially to reduce the number of real property disputes. The profession will fortunately have time to digest the Act thoroughly before it comes into operation on the first of January, 1925. The Council of Legal Education has promptly arranged for a special course of lectures on the Act by Mr. A. F. Topham, K. C., who is a recognized authority on Real Property. Both professions are already taking a great interest in the new law, which will probably affect the daily work of solicitors and Chancery barristers more than any statute of the last three centuries."—From the *Canadian Law Times*, Nov., 1922.

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Distribution of Income by States in United States in 1919

In the following table important and interesting information as to the geographical distribution of income in the United States is made available for the first time.

This table is taken from "Distribution of Income by States in 1919," by Oswald W. Knauth, being one of the studies of The National Bureau of Economic Research.

The figures on the total income of all persons in the United States are the result of an earlier study by the same Bureau, appearing under the title of "Income in the United States in 1919."

The method by which the figures given in the table below were arrived at is fully set out in the volume first mentioned.

STATE	Total income (thousands)	Population Jan. 1, 1920	Per capita income	Per cent of total national income in the State	Per cent of total population in the State	Number of persons gainfully employed Jan. 1, 1920	Average Income per person gainfully employed
UNITED STATES	$66,252,601	105,710,620	$627	100.00	100.00	41,609,192	$1,592
NEW ENGLAND							
Maine	448,106	768,014	583	.68	.73	309,858	1,446
New Hampshire	264,530	443,083	597	.40	.42	192,827	1,372
Vermont	186,479	352,428	529	.28	.33	138,484	1,347
Massachusetts	3,034,020	3,852,356	788	4.58	3.64	1,728,297	1,755
Rhode Island	434,988	604,397	720	.66	.57	275,000	1,582
Connecticut	990,388	1,380,631	717	1.50	1.31	589,816	1,679
MIDDLE ATLANTIC							
New York	9,074,859	10,385,227	874	13.70	9.83	4,504,791	2,014
New Jersey	2,392,104	3,155,900	758	3.61	2.99	1,310,379	1,826
Pennsylvania	5,958,018	8,720,017	683	8.99	8.25	3,426,361	1,739
EAST-NORTH CENTRAL							
Ohio	3,967,713	5,759,394	689	5.99	5.45	2,300,412	1,725
Indiana	1,702,776	2,930,390	581	2.57	2.77	1,117,032	1,524
Illinois	4,962,384	6,485,280	765	7.49	6.14	2,626,547	1,889
Michigan	2,581,907	3,668,412	704	3.90	3.47	1,473,614	1,752
Wisconsin	1,466,513	2,632,067	557	2.22	2.49	995,401	1,473
WEST-NORTH CENTRAL							
Minnesota	1,386,514	2,387,125	581	2.09	2.26	906,623	1,529
Iowa	1,697,401	2,404,021	706	2.56	2.27	858,699	1,977
Missouri	1,822,428	3,404,055	535	2.75	3.22	1,317,010	1,384
North Dakota	332,916	646,872	515	.50	.61	207,082	1,608
South Dakota	436,254	636,547	685	.66	.60	216,573	2,014
Nebraska	909,558	1,296,372	702	1.37	1.23	457,081	1,990
Kansas	1,065,339	1,769,257	602	1.61	1.67	624,391	1,706
SOUTH ATLANTIC							
Delaware	176,591	223,003	792	.27	.21	91,224	1,936
Maryland	999,529	1,449,661	689	1.51	1.37	603,473	1,656
District of Columbia	386,929	437,571	884	.58	.41	236,027	1,639
Virginia	990,107	2,309,187	429	1.49	2.18	833,177	1,188
West Virginia	655,723	1,463,701	448	.99	1.39	491,117	1,335
North Carolina	980,596	2,559,123	383	1.48	2.42	895,852	1,095
South Carolina	735,398	1,683,724	437	1.11	1.59	674,257	1,091
Georgia	1,141,953	2,895,832	394	1.72	2.74	1,128,742	1,012
Florida	406,477	968,476	420	.61	.92	385,313	1,055
EAST-SOUTH CENTRAL							
Kentucky	946,610	2,416,630	392	1.43	2.29	851,122	1,112
Tennessee	853,867	2,337,885	365	1.29	2.21	829,875	1,029
Alabama	810,226	2,348,174	345	1.22	2.22	908,216	892
Mississippi	629,071	1,790,618	351	.95	1.69	721,412	872
WEST-SOUTH CENTRAL							
Arkansas	663,742	1,752,204	379	1.00	1.66	634,564	1,046
Louisiana	771,414	1,798,509	429	1.17	1.70	681,237	1,132
Oklahoma	1,083,851	2,028,283	534	1.64	1.92	681,439	1,591
Texas	2,511,050	4,663,228	538	3.79	4.41	1,718,945	1,461
MOUNTAIN							
Montana	281,130	548,889	512	.42	.52	214,183	1,313
Idaho	260,665	431,866	604	.39	.41	153,459	1,699
Wyoming	153,297	194,402	789	.23	.18	81,536	1,880
Colorado	600,483	939,629	639	.91	.89	366,458	1,639
New Mexico	147,107	360,350	408	.22	.34	122,031	1,205
Arizona	221,788	334,162	664	.33	.32	130,579	1,698
Utah	232,324	449,396	517	.35	.43	149,201	1,557
Nevada	65,791	77,407	850	.10	.07	37,548	1,752
PACIFIC							
Washington	1,066,073	1,356,621	786	1.61	1.28	578,470	1,843
Oregon	556,622	783,389	711	.84	.74	322,137	1,728
California	2,808,992	3,426,861	820	4.24	3.24	1,511,320	1,859